

REPORTS
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PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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Kevin Kelly
Reporter of Opinions

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PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning September 1, 2005 through August 31, 2006. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 1978, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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XE-2006-0105	City of Springfield, Missouri (Request to waive portions of Commission rule 4 CSR 240-31.065, which requires carriers to charge and collect, as a separate line item on each customer's bill, a Missouri Universal Service Fund surcharge, granted).....	11/3/05
TD-2006-0136	Citylink of Kansas City (Certificate of service authority, IXC, canceled).....	10/13/05
TM-2006-0206	Claricom Networks, LLC (Certificate of service authority, IXC, canceled).....	3/10/06
TM-2006-0206	Claricom Networks, LLC and Matrix Telecom, Inc. (Transfer of membership interests and ultimate merger of Claricom Networks, LLC into Matrix Telecom, Inc., approved).....	12/19/05
PD-2006-0027	Clark, Charles Glenn d/b/a Clark's Communications System (Certificate of service authority, pay phones, canceled).....	10/17/05
PD-2006-0261	Clay, Randolph Bradford (Certificate of service authority, pay phones, canceled).....	1/27/06
LA-2006-0274	CLEC, Inc. (Certificate of service authority, basic local, local exchange and IXC, granted).....	2/28/06
PD-2006-0027	Cline, Kyle B. (Certificate of service authority, pay phones, canceled).....	10/17/05
PD-2005-0235	Collins, Estanya (Certificate of service authority, pay phones, canceled).....	12/15/05
LA-2005-0417	Comcast Phone of Missouri, LLC d/b/a Comcast Digital Phone (Certificate of service authority, basic local, local exchange and IXC services, granted).....	9/1/05
TK-2006-0372	Comcast Phone, LLC (Interconnection agreement with Cellco Partnership d/b/a Verizon Wireless, approved)..	5/24/06
TD-2006-0302	Comm South Companies, Inc. d/b/a Missouri Comm South, Inc. (Certificates of service authority, IXC, basic local and local exchange telecommunications services, canceled).....	1/31/06
LA-2006-0174	CommPartners, LLC (Certificate of service authority, facilities-based and resold basic local telecommunications services, granted).....	1/19/06
LA-2006-0311	CommPartners, LLC (Certificate of service authority, IXC and non-switched local exchange telecommunications services, restricted to providing dedicated private line services, approved).....	3/1/06
XD-2006-0052	Communications Billing, Inc. (Certificate of service authority, IXC, canceled).....	9/12/05
XD-2006-0414	Communigroup of K.C., Inc. (Certificate of service authority, IXC, canceled).....	5/5/06
TM-2006-0186	Comtel Telecom Assets LP (Acquisition of certain assets from VarTec Telecom, Inc., Excel Telecommunications, Inc. and VarTec Solutions, Inc., approved).....	2/3/06

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TA-2006-0214	Comtel Telecom Assets LP (Certificate of service authority, basic local exchange telecommunications services and IXC, granted).....	2/2/06
PD-2006-0252	Conlee, Mark L. (Certificate of service authority, pay phones, canceled).....	12/28/05
WO-2006-0135	Consolidated Public Water Supply District No. 1 of Clark County (Territorial agreement with the City of Canton, approved).....	12/22/05
TO-2006-0216	Covad Communications Company (Amendment to interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, approved).....	1/13/06
PD-2006-0099	Crabtree, William Patrick d/b/a Crystal Communications (Certificate of service authority, pay phones, canceled)..	9/20/05
TO-2004-0505	Craw-Kan Telephone Cooperative (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TO-2006-0260	Craw-Kan Telephone Cooperative, Inc. (Interconnection agreement with United States Cellular Corporation, approved).....	1/18/06
PD-2006-0252	Crow, Larry d/b/a L&L Telecom (Certificate of service authority, pay phones, canceled).....	12/28/05
PD-2006-0187	Cybertech Electronics and Communications, L.L.C. (Certificate of service authority, pay phones, canceled)..	11/22/05
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PD-2006-0447	Data Tel Communications, LLC; St. Joe Inn, Inc. d/b/a Days Inn; T&T Communications, LLC; and BNL Communications, Inc. (Certificates of service authority, pay phone, canceled).....	6/6/06
PD-2005-0235	De Vera, Darla Ray (Certificate of service authority, pay phones, canceled).....	12/15/05
PD-2006-0442	Degraffenreid, John B.; Alan Ray Felten; Nathan Veach; Jim Ecton d/b/a JSE Enterprises; Catherine A. Ragland; Desh V. Anand; Thomas Parr; Todd R. Prother (Certificate of service authority, pay phones, canceled).....	6/29/06
PD-2006-0252	Denatale, Joseph (Certificate of service authority, pay phones, canceled).....	12/28/05
TK-2006-0455	DIECA Communications, Inc. d/b/a Covad Communications Company (Amendment to interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri, approved).....	7/11/06
PD-2006-0137	Dolliver, Robert H. , IV (Certificate of service authority, pay phones, canceled).....	10/13/05
PD-2006-0137	Douglas, Wendy (Certificate of service authority, pay phones, canceled).....	10/13/05
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PD-2006-0442	Ecton, Jim d/b/a JSE Enterprises; Alan Ray Felten; Nathan Veach; Catherine A. Ragland; Desh V. Anand; John B. Degraffenreid; Thomas Parr; and Todd R. Prother (Certificate of service authority, pay phones, canceled)	6/29/06

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XN-2007-0006	Electric Lightwave, LLC (Adoption by Electric Lightwave, LLC of the fictitious name Electric Lightwave, LLC, d/b/a Integra Telecom, Recognized)...	8/14/06
XA-2006-0312	EliteView, LLC d/b/a GroveLine (Certificate of service authority, IXC and non-switched local exchange telecommunications services, restricted to providing dedicated private line services, approved).....	3/2/06
TO-2006-0238	Ellington Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/10/06
TO-2004-0480	Ellington Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
EO-2006-0213	Empire District Electric Company and Ozark Electric Cooperative (Change of electric supplier, granted).....	3/1/06
PA-2006-0355	Empire Payphones, Inc. (Certificate of service authority, pay phones, granted).....	5/11/06
XA-2006-0421	Encartele, Inc. (Certificate of service authority, IXC, approved).....	5/26/06
WR-2006-0131	Evergreen Lake Water Company, Inc. (Small company rate increase, approved).....	10/25/05
TM-2006-0186	Excel Telecommunications, Inc. (Certificate of service authority, local exchange and interexchange services, canceled).....	6/27/06
XD-2006-0559	Exergy Group, LLC (Certificate of service authority, IXC, canceled).....	7/24/06
TO-2006-0177	ExOp of Missouri, Inc. d/b/a Unite (Interconnection agreement with United States Cellular Corporation, approved).....	11/29/05
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TO-2006-0292	Farber Telephone Company ((Interconnection agreement with United States Cellular Corporation, approved).....	2/7/06
TO-2004-0437	Farber Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
PD-2006-0163	Farthing Enterprises, Inc., KL Marketing Corp., d/b/a Advanced Coin Telephone, Gateway Payphone, Inc., Missouri Public Payphone Corporation, MO-KAN Telecom, Inc., and Phillips Maduros Enterprises, Inc. (Certificate of service authority, pay phones, canceled).....	11/15/05
PD-2006-0442	Felten, Alan Ray; Nathan Veach; Jim Ecton d/b/a JSE Enterprises; Catherine A. Ragland; Desh V. Anand; John B. Degraffenreid; Thomas Parr; Todd R. Prother (Certificate of service authority, pay phones, canceled).....	6/29/06
TO-2006-0242	Fidelity Communications Services I, Inc. (Interconnection agreement with United States Cellular Corporation, approved).....	1/13/06

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TO-2006-0243	Fidelity Communications Services II (Interconnection agreement with United States Cellular Corporation, approved).....	1/25/06
TO-2006-0219	Fidelity Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	12/29/05
TO-2006-0489	Fidelity Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TA-2007-0033	First Choice Technology, Inc. (Certificate of service authority, IXC, approved).....	8/21/06
PD-2006-0252	Fiscus, Larry A. (Certificate of service authority, pay phones, canceled).....	12/28/05
PD-2006-0252	Flora, Harold B. d/b/a American Telephone Service (Certificate of service authority, pay phones, canceled)..	12/28/05
PD-2006-0099	Francis, Scott D. (Certificate of service authority, pay phones, canceled).....	9/20/05
PD-2005-0235	Freeze, Jeff C. (Certificate of service authority, pay phones, canceled).....	12/15/05
TC-2006-0068	FullTel, Inc., v. CenturyTel of Missouri, LLC (Complaint case, Report and Order).....	6/15/06
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PD-2006-0163	Gateway Payphone, Inc., KL Marketing Corp., d/b/a Advanced Coin Telephone, Farthing Enterprises, Inc., Missouri Public Payphone Corporation, MO-KAN Telecom, Inc., and Phillips Maduros Enterprises, Inc. (Certificate of service authority, pay phones, canceled).....	11/15/05
PD-2006-0027	Gilmore, Kent d/b/a Lourell's (Certificate of service authority, pay phones, canceled).....	10/17/05
EO-2006-0145	Girardeau Stevedores Contractors (Change of electric supplier from SEMO Electric Cooperative to AmerenUE, approved).....	1/24/06
TK-2006-0089	Global Connection Incorporated of America (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved).....	9/26/05
PD-2006-0137	Golden Tel, Inc. (Certificate of service authority, pay phones, canceled).....	10/13/05
TF-2006-0003	Goodman Telephone Company (Request for financing, approved).....	10/13/05
TO-2004-0490	Goodman Telephone Company, Ozark Telephone Company and Seneca Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TO-2006-0222	Goodman Telephone Company, Seneca Telephone Company, and Ozark Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
TO-2006-0287	Granby Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	2/8/06

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TO-2004-0493	Granby Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TO-2006-0245	Grand River Mutual Telephone Corporation (Interconnection agreement with United States Cellular Corporation, approved).....	1/11/06
TO-2004-0456	Grand River Mutual Telephone Corporation (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
EE-2005-0486	Grand View Tower, LLC (Seeking variance from Commission rule related to metering in connection with the construction and operation of a multi-family residential apartment building in St. Louis, granted).....	2/21/06
TA-2006-0382	Granite Telecommunications, LLC (Certificate of service authority, basic local telecommunications service, granted).....	5/11/06
TO-2006-0229	Green Hills Telecommunications Services (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
TO-2004-0428	Green Hills Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
TO-2006-0224	Green Hills Telephone Corporation (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
PD-2006-0252	Guelker, Jerry (Certificate of service authority, pay phones, canceled).....	12/28/05
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PD-2005-0235	Hancock, Glen E. (Certificate of service authority, pay phones, canceled).....	12/15/05
WO-2005-0127	Hannibal, City of and Public Water Supply District No. 1 of Ralls County (Addendum to water service territorial agreement, approved).....	12/15/05
PD-2006-0027	Hardt, Russell E. (Certificate of service authority, pay phones, canceled).....	10/17/05
PD-2006-0256	Harris, Robert L. d/b/a 21 st Century Communications (Certificate of service authority, pay phones, canceled).....	12/28/05
PD-2006-0261	Havens, John A., d/b/a Southern Missouri Telecom (Certificate of service authority, pay phones, canceled).....	1/27/06
WR-2006-0250 &SR-2006-0249 XD-2006-0467	Hickory Hills Water & Sewer Company (Sewer and water rate cases, Report and Order).....	6/15/06
	Hierholzer Communications, Inc. d/b/a Andrew Communications (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, canceled).....	7/11/06
PD-2006-0261	Holst, Rodney S. (Certificate of service authority, pay phones, canceled).....	1/27/06

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TO-2006-0270	Holway Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/25/06
TO-2004-0403	Holway Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
PA-2006-0322	Huang, Wil d/b/a HQ Payphone Services (Certificate of service authority, pay phones, granted).....	2/28/06
PD-2005-0235	Hughs, Brian (Certificate of service authority, pay phones, canceled).....	12/15/05
PD-2006-0252	Hunter, Mark A. (Certificate of service authority, pay phones, canceled).....	12/28/05
TM-2006-0289	Hypercube, LLC (Transfer control of KMC Data LLC from KMC Telecom Holdings, Inc. to Hypercube, LLC, application dismissed due to a lack of jurisdiction).....	2/23/06
TO-2004-0459	Iamo Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
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XN-2006-0191	IBFA Acquisition Company, LLC (Name change to IBFA Acquisition Company, LLC d/b/a Farm Bureau Connection, acknowledged).....	12/1/05
LD-2006-0396	ICG Telecom Group, Inc. (Certificate of service authority, basic local telecommunications services, IXC and non-switched local exchange telecommunications services, canceled).....	4/19/06
CA-2006-0033	Infotelecom, LLC (Certificate of service authority, basic local telecommunications services on a facilities-based and resold basis, granted).....	9/27/05
TM-2006-0362	Integra Telecom Holdings, Inc. and Electric Lightwave, LLC (Transfer of control of Electric Lightwave, LLC, from CU Capital, LLC to Integra, joint application dismissed due to a lack of jurisdiction).....	5/2/06
XA-2006-0492	Integrated Services, Inc. d/b/a Integrated Services of Nevada, Inc. (Certificate of service authority, IXC, approved).....	7/19/06
PA-2007-0016	InterVox Link, L.L.C. (Certificate of service authority, pay phones, granted).....	8/3/06
IE-2006-0290	Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom (Temporary waiver of rule requiring it to list its Missouri Universal Service Fund surcharge as a separate line item on bills for Missouri customers, granted).....	2/2/06
TE-2006-0337	Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom (Waiver of Commission rule regarding interest on customer deposits and guarantees of payment, granted).....	4/6/06
XA-2006-0223	IPC Network Services, Inc. (Certificate of service authority, IXC, nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, approved).....	1/3/06

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LA-2006-0067	Ironhorse, LLC (Certificate of service authority, basic local, nonswitched local and IXC services, granted).....	10/20/05
LA-2006-0067	Ironhorse, LLC (Certificate of service authority, basic local, local exchange and IXC, order modifying order granting certificate to reflect Ironhorse Services LLC as the correct legal identity).....	5/3/06
PD-2005-0235	Irvin, Andrew J. and Donna M. (Certificate of service authority, pay phones, canceled).....	12/15/05
XN-2006-0407	ITC DeltaCom Communications, Inc. (Name change to DeltaCom, Inc. d/b/a DeltaCom Business Solutions, Inc., order recognizing name change).....	5/2/06
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PD-2006-0190	J.T. Enterprises, Inc. (Certificate of service authority, pay phones, canceled).....	12/19/05
PD-2006-0252	Jadjiha, Mojtaba M. (Certificate of service authority, pay phones, canceled).....	12/28/05
PA-2006-0484	JN Payphones, L.L.C. (Certificate of service authority, pay phones, granted).....	7/11/06
PD-2006-0027	Jones, Edmund D. d/b/a Vagabond Publishing Company (Certificate of service authority, pay phones, canceled).....	10/17/05
EO-2006-0553	Jones, Steve (Change of electric supplier from Union Electric Company d/b/a AmerenUE to Jackson Electric Distribution Department, granted).....	8/22/06
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PD-2006-0103	Kansas City Orange Communications, Inc. (Certificate of service authority, pay phones, canceled).....	9/13/05
EO-2006-0094	Kansas City Power & Light Company (Maintain accrual and funding of Wolf Creek generating station decommissioning costs at current levels, approved)....	1/10/06
EO-2006-0193	Kansas City Power & Light Company (New rate schedule that allows KCPL and large customers to enter into special contracts subject to certain conditions contained in the tariff, approved).....	3/16/06
XA-2006-0461	Kentucky Data Link, Inc. (Certificate of service authority, IXC, granted).....	8/22/06
TO-2006-0220	Kingdom Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
TO-2004-0487	Kingdom Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
PD-2006-0163	KL Marketing Corp., d/b/a Advanced Coin Telephone, Farthing Enterprises, Inc., Gateway Payphone, Inc., Missouri Public Payphone Corporation, MO-KAN Telecom, Inc., and Phillips Maduros Enterprises, Inc. (Certificate of service authority, pay phones, canceled).....	11/15/05

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TO-2006-0269	KLM Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/25/06
TO-2004-0401	KLM Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
SR-2006-0285	KMB Utility Corporation (Small company sewer rate increase, approved).....	2/17/06
WR-2006-0286	KMB Utility Corporation (Water rate increase case, agreement approved).....	4/11/06
TD-2006-0548	KMC Telecom V, Inc. (Certificate of service authority, IXC, basic local telecommunications services and nonswitched local exchange telecommunications services, canceled).....	7/10/06
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GE-2005-0405	Laclede Gas Company (Order approving agreement for a variance through the end of 2006 from the statistical sampling meter testing procedure referenced in Rule 10.A of its tariffs).....	4/11/06
PD-2006-0252	Langworthy, Mark B. d/b/a Midwest Telephone (Certificate of service authority, pay phones, canceled)..	12/28/05
PD-2006-0261	Langworthy, Webb (Certificate of service authority, pay phones, canceled).....	1/27/06
PD-2006-0261	Langworthy, Webb, d/b/a Webb Communications (Certificate of service authority, pay phones, canceled)..	1/27/06
TO-2006-0246	Lathrop Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/11/06
TO-2004-0457	Lathrop Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
PD-2006-0099	Lawson, Sonja Marie d/b/a Sonja Marie Communications (Certificate of service authority, pay phones, canceled)..	9/20/05
PD-2006-0252	Leach, Linda R. (Certificate of service authority, pay phones, canceled).....	12/28/05
PD-2006-0114	Lenox, Gwenda G. (Certificate of service authority, pay phones, canceled).....	9/28/05
TO-2006-0225	Le-Ru Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	12/29/05
TO-2004-0494	Le-Ru Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
PD-2005-0235	Lewis, Dennis A. (Certificate of service authority, pay phones, canceled).....	12/15/05
TA-2006-0267	LMDS Holdings, Inc. (Certificate of service authority, IXC and basic local and non-switched local exchange telecommunications services, approved).....	2/8/06
PD-2005-0235	Loyd, Gary (Certificate of service authority, pay phones, canceled).....	12/15/05
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PD-2006-0261	Magaster, Robert (Certificate of service authority, pay phones, canceled).....	1/27/06

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PD-2006-0111	MAH Communications/Utelecom, L.L.C. (Certificate of service authority, pay phones, canceled).....	9/26/05
PD-2006-0164	Mannacom Telecommunications, Inc., CAI of Texas, Inc., and Northwestern Communications, Inc. (Certificate of service authority, pay phones, canceled).....	11/14/05
TA-2000-591	Mark Twain Communications Company (Designation as an eligible carrier under Section 254 of the Telecommunications Act of 1996, order correcting June 15, 2000 order).....	1/19/06
TO-2006-0258	Mark Twain Communications Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/19/06
TO-2006-0100	Mark Twain Communications Company (Redefinition of service of Spectra Communications Group, LLC for purposes of eligibility of Mark Twain Communications Company to receive universal service support, order).....	1/19/06
TO-2006-0259	Mark Twain Rural Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/18/06
TO-2004-0458	Mark Twain Rural Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
PD-2006-0252	Marshall, Douglas C. d/b/a Mi Familia Distributing (Certificate of service authority, pay phones, canceled).....	12/28/05
PD-2006-0197	Mart Building Company (Certificate of service authority, pay phones, canceled).....	11/22/05
PD-2006-0196	Matex Corporation (Certificate of service authority, pay phones, canceled).....	11/16/05
TM-2005-0324	Matrix Telecom, Inc., Global Crossing Telecommunications, Inc., Global Crossing Local Services, Inc., and Global Crossing Telemanagement, Inc. (Sale of assets in which Matrix would acquire certain assets and the Small Business Group customer base from the Global Crossing companies, approved).....	11/17/05
CA-2005-0393	Matrix Telecom, Inc. (Certificate of service authority, basic local telecommunications services, granted).....	10/25/05
PD-2006-0188	Mays Medical Properties, Inc. (Certificate of service authority, pay phones, canceled).....	11/22/05
TO-2006-0265	McDonald County Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	2/3/06
TO-2006-0491	McDonald County Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TO-2006-0478	MCI Communications Services, Inc. d/b/a Verizon Business Services (Seeking reversal of the North American Numbering Plan Administrator's decision to deny request for additional numbering resources, order granting additional numbering resources).....	6/27/06

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TO-2006-0140	MCI Network Services, Inc. (Certificate of service authority, IXC and pay phone services, canceled).....	4/26/06
TN-2006-0014	MCI WorldCom Communications, Inc. and MCI WorldCom Network Services, Inc. (Name change of MCI WorldCom Communications to MCI Communications Services, Inc. and name change of MCI WorldCom Network Services to MCI Network Services, Inc., order recognizing name changes).....	9/1/05
TO-2006-0140	MCI, Inc. (Transfer of certain assets of MCI Network Services, Inc. to MCI Communications Services, Inc., approved).....	11/17/05
LN-2006-0276	MCImetro Access Transmission Services, LLC (Name change to Verizon Access Transmission Services, recognized).....	1/5/06
TO-2006-0367	MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services (Commission order reversing decision of the North American Numbering Plan Administrator and closing case).....	4/6/06
CA-2006-0483	Mercury Voice and Data Company (Certificate of service authority, basic local telecommunications services, local exchange telecommunications service restricted to dedicated private line service IXC, granted).....	7/20/06
PD-2006-0252	Merx, Michael V. (Certificate of service authority, pay phones, canceled).....	12/28/05
TD-2006-0353	Metro Teleconnect Companies, Inc. (Certificates of service authority, IXC and local service, canceled).....	3/27/06
TK-2006-0041	Metropolitan Telecommunications of Missouri, Inc. (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved).....	9/16/05
WR-2006-0212	Middlefork Water Company (Small water rate increase request, approved).....	12/15/05
TK-2006-0167	Mid-Missouri Telephone Company (Arbitrated interconnection agreement with T-Mobile USA, Inc., approved).....	11/3/05
TO-2004-0455	Mid-Missouri Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TO-2006-0226	Miller Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
TO-2004-0511	Miller Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
GO-2002-48	Missouri Gas Energy (Application to amend the Company's safety line replacement program, approved)	12/22/05
WO-2006-0284	Missouri-American Water Company (Order approving infrastructure system replacement surcharge but rejecting tariff).....	3/28/06
PD-2006-0163	Missouri Public Payphone Corporation, KL Marketing Corp., d/b/a Advanced Coin Telephone, Farthing Enterprises, Inc., Gateway Payphone, Inc., MO-KAN Telecom, Inc., and Phillips Maduros Enterprises, Inc. (Certificate of service authority, pay phones, canceled).....	11/15/05

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TK-2006-0453	MOKAN DIAL INC. (Wireless interconnection agreement and reciprocal compensation agreement with Verizon Wireless LLC d/b/a Verizon Wireless, approved).....	7/11/06
IO-2004-0545	MoKan Dial, Inc. (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
PD-2006-0163	MO-KAN Telecom, Inc., KL Marketing Corp., d/b/a Advanced Coin Telephone, Farthing Enterprises, Inc., Gateway Payphone, Inc., Missouri Public Payphone Corporation, and Phillips Maduros Enterprises, Inc. (Certificate of service authority, pay phones, canceled).....	11/15/05
PD-2005-0235	Mullins, Doug (Certificate of service authority, pay phones, canceled).....	12/15/05
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XA-2006-0409	Nationwide Long Distance Service, Inc. (Certificate of service authority, IXC, granted).....	5/19/06
XD-2006-0381	Nationwide Professional Teleservices, LLC (Certificate of service authority, IXC, canceled).....	4/14/06
CK-2006-0443	Navigator Telecommunications, LLC (Amendment to interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, approved).....	6/20/06
CA-2006-0035	Neutral Tandem-Missouri, LLC (Certificate of service authority, basic local telecommunications services, granted).....	11/10/05
TK-2006-0146	Neutral Tandem-Missouri, LLC (Interconnection agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, approved).....	11/29/05
TM-2006-0307	New Edge Network, Inc. d/b/a New Edge Networks (Transfer of control of New Edge Network, Inc. from parent company, New Edge Holding Company to Earthlink, Inc., dismissed for lack of jurisdiction).....	2/23/06
TO-2006-0293	New Florence Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	2/3/06
TO-2004-0503	New Florence Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
TO-2004-0370	New London Telephone Company, Orchard Farm Telephone Company and Stoutland Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TO-2006-0324	New London Telephone Company, Orchard Farm Telephone Company and Stoutland Telephone Company (Interconnection agreement with T-Mobile USA, Inc., approved).....	3/23/06

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TK-2006-0154	New London Telephone Company, Orchard Farm Telephone Company, and Stoutland Telephone Company (Interconnection agreement with Cingular Wireless, LLC, granted).....	11/10/05
TK-2006-0166	Northeast Missouri Rural Telephone Company (Arbitrated interconnection agreement with T-Mobile USA, Inc., approved).....	11/3/05
IO-2004-0468	Northeast Missouri Rural Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/17/06
TK-2006-0438	Northwest Missouri Cellular Limited Partnership (Amendment to interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, approved).....	6/20/06
PD-2006-0164	Northwestern Communications, Inc.; CAI of Texas, Inc., and Mannacom Telecommunications, Inc. (Certificate of service authority, pay phones, canceled).....	11/14/05
LN-2006-0448	Now Acquisition Corporation (Name change to Now Communications, Inc., of Delaware d/b/a Cleartel Communications, order acknowledging name change)....	6/14/06
XM-2004-0065	NOW Communications, Inc. (Certificates of service authority, basic local telecommunications and IXC services, canceled).....	5/4/06
PD-2006-0237	Nurwahyu Fajaryanto and Nurwahyu Fajaryanto, d/b/a NF Enterprises (Certificate of service authority, pay phones, canceled).....	12/14/05
TF-2006-0408	NuVox Communications of Missouri, Inc. (Financing application, approved).....	5/4/06
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PD-2006-0027	Obernier, David E. (Certificate of service authority, pay phones, canceled).....	10/17/05
XD-2006-0552	OCMC, Inc. d/b/a AdvantTel (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	7/25/06
XD-2006-0552	OCMC, Inc. d/b/a 1-800-MAX-SAVE (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	7/25/06
XD-2006-0552	OCMC, Inc. d/b/a One Call Communications, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	7/25/06
XD-2006-0552	OCMC, Inc. d/b/a Opticom (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled).....	7/25/06
ZD-2006-0326	Officeplus Corporation of Missouri (Certificate of service authority, shared tenant services, canceled).....	2/27/06
PA-2007-0017	Olympic Ventures, L.L.C. (Certificate of service authority, pay phones, granted).....	8/3/06
TM-2006-0452	OnFiber Communications, Inc. (Transfer control of OnFiber Carrier Services, Inc., a wholly owned subsidiary of OnFiber, Inc. from OnFiber, Inc. to Qwest Communications Corporation, joint application dismissed due to a lack of jurisdiction).....	11/14/05
		6/13/06

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XD-2006-0097	Optical Telephone Corporation (Certificate of service authority, IXC, canceled).....	9/20/05
TO-2006-0445	Orchard Farm Telephone Company (Interconnection agreement with Charter Fiberlink – Missouri, LLC, approved).....	6/29/06
TO-2006-0279	Oregon Farmers Mutual Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	2/3/06
TO-2004-0526	Oregon Farmers Mutual Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
PA-2006-0485	Overlord Telecommunications, L.L.C. (Certificate of service authority, pay phones, granted).....	7/11/06
TO-2006-0222	Ozark Telephone Company, Seneca Telephone Company, and Goodman Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
CA-2006-0083	Ozarks Telecom, LLC (Certificate of service authority, basic local telecommunications services, granted).....	10/20/05
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PD-2006-0261	Pace, Tony M. (Certificate of service authority, pay phones, canceled).....	1/27/06
LA-2006-0155	Pac-West Telecomm, Inc. (Certificates of service authority, IXC, nonswitched local exchange, restricted to providing dedicated private line services, and basic local exchange telecommunications services, approved).....	12/29/05
TM-2006-0210	PAETEC Communications, Inc. and American Long Lines, Inc. (Merger of American Long Lines into PAETEC, transfer of all of American Long Lines' customers to PAETEC, and discontinue American Long Lines' operations in Missouri, approved).....	12/20/05
PD-2006-0099	Pahwa, Jeet d/b/a S.R. Telecommunications (Certificate of service authority, pay phones, canceled).....	9/20/05
PD-2006-0442	Parr, Thomas; Alan Ray Felten; Nathan Veatch; Jim Ecton d/b/a JSE Enterprises; Catherine A. Ragland; Desh V. Anand; John B. Degraffenreid; and Todd R. Prother (Certificate of service authority, pay phones, canceled).....	6/29/06
TO-2006-0227	Peace Valley Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06
TO-2004-0437	Peace Valley Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
PD-2006-0163	Phillips Maduros Enterprises Enterprises, Inc., KL Marketing Corp., d/b/a Advanced Coin Telephone, Farthing Enterprises, Inc., Gateway Payphone, Inc., Missouri Public Payphone Corporation, and MO-KAN Telecom, Inc. (Certificate of service authority, pay phones, canceled).....	11/15/05

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PD-2006-0103	Phonely Corporation (Certificate of service authority, pay phones, canceled).....	4/19/06
XD-2006-0400	Popp Telecom Incorporated (Certificate of service authority, IXC, canceled).....	9/28/05
PD-2006-0116	Premier Pay Phones, L.L.C. (Certificate of service authority, pay phones, canceled).....	9/13/05
LD-2006-0469	Premiere Network Services, Inc. (Certificate of service authority, basic local and IXC telecommunications services, canceled).....	7/12/06
PD-2006-0261	Privitera, Tamela, d/b/a T.P. Services (Certificate of service authority, pay phones, canceled).....	1/27/06
PD-2006-0442	Prother, Todd R.; Alan Ray Felten; Nathan Veach; Jim Ecton d/b/a JSE Enterprises; Catherine A. Ragland; Desh V. Anand; John B. Degraffenreid; Thomas Parr (Certificate of service authority, pay phones, canceled)..	6/29/06
PA-2006-0080	Protocall Telecom L.L.C. (Certificate of service authority, pay phones, granted).....	10/4/05
XD-2006-0477	PT-1 Communications, Inc. (Certificate of service, IXC, canceled).....	7/20/06
WC-2006-0061	Public Service Commission Staff v. Franklin County Water, Inc. (Complaint case, allegations of failing to file 2003 and 2004 annual reports, order of default).....	10/4/05
WC-2006-0062	Public Service Commission Staff v. Port Perry Service Company (Complaint case, allegations of failing to file 2004 annual report, staff motion for determination on the pleadings, granted).....	11/10/05
WC-2006-0063	Public Service Commission Staff v. S.K.&M. Water and Sewer Company (Complaint case, allegations of failing to file 2004 annual report, staff motion for determination on the pleadings, granted).....	11/10/05
WC-2007-0042	Public Service Commission Staff v. Mike Ward (Complaint case, order granting default).....	8/31/06
XC-2006-0051	Public Service Commission Staff v. Globcom, Inc. (Complaint case, allegations of failure to pay assessment for fiscal year 2005 and failure to timely file annual report for 2004, order granting default).....	9/20/05
WC-2006-0030	Public Service Commission Staff v. Missouri Utilities Company (Complaint case, allegations company did not file its 2004 annual report and did not pay its annual assessment for fiscal year 2005, order granting default).	4/11/06
TC-2005-0366	Public Service Commission Staff v. Suretel, Inc. (Complaint case, allegations of failing to file its 2003 annual report and failing to pay annual assessment for 2005, order of default, certificate of service authority, resold basic local telecommunications services, canceled).....	9/27/05
WO-2006-0230	Public Water Supply District No. 2 of St. Charles County and City of Wentzville (Amendment to water service territorial agreement, approved).....	3/2/06

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XD-2006-0399	Quick Tel, Inc. (Certificate of service authority, IXC, canceled).....	4/25/06
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PD-2006-0442	Ragland, Catherine A.; Alan Ray Felten; Nathan Veach; Jim Ecton d/b/a JSE Enterprises; Catherine A. Ragland; Desh V. Anand; John B. Degraffenreid; Thomas Parr; and Todd R. Prother (Certificate of service authority, pay phones, canceled).....	6/29/06
XM-2006-0185	Red River Networks, LLC (Transfer of assets to NOSVA Limited Partnership; cancellation of certificate of authority and tariff, approved).....	2/23/06
PD-2006-0137	Reliable Payphone, Inc. (Certificate of service authority, pay phones, canceled).....	10/13/05
TN-2006-0207	Ren-Tel Communications, Inc. (Name change to Ren-Tel Communications d/b/a DialTone & More, recognized).....	12/6/05
PD-2005-0235	Reynolds, Brent J. (Certificate of service authority, pay phones, canceled).....	12/15/05
PD-2006-0261	Roberts, Shane Otis (Certificate of service authority, pay phones, canceled).....	1/27/06
PD-2006-0261	Robinson, T. Alvin (Certificate of service authority, pay phones, canceled).....	1/27/06
TO-2004-0439	Rock Port Telephone Company (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
TO-2006-0251	Rock Port Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/13/06
PD-2006-0027	Ross, Douglas (Certificate of service authority, pay phones, canceled).....	10/17/05

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PD-2006-0252	Sander, Timothy W. d/b/a Independent Telecom (Certificate of service authority, pay phones, canceled).....	12/28/05
TK-2006-0384	SBC Advanced Solutions, Inc. d/b/a AT&T Advanced Solutions (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, order approving amendment to interconnection agreement).....	5/9/06
PD-2005-0235	Sellaro, Frank (Certificate of service authority, pay phones, canceled).....	12/15/05
XD-2005-0440, et al.	Se-Ma-No Technologies, LLC (Certificates of service authority, non-switched local and IXC, canceled).....	11/1/05
TO-2006-0222	Seneca Telephone Company, Ozark Telephone Company and Goodman Telephone Company (Interconnection agreement with United States Cellular Corporation, approved).....	1/4/06

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XD-2006-0081	Shared Communications Services, Inc. (Certificate of service authority, IXC, canceled).....	9/2/05
PD-2006-0261	Shelton, Shawn (Certificate of service authority, pay phones, canceled).....	1/27/06
PD-2005-0235	Smith, Christopher (Certificate of service authority, pay phones, canceled).....	12/15/05
TA-2007-0041	SNET America, Inc., d/b/a AT&T Long Distance East (Certificate of service authority, IXC, granted).....	8/22/06
TK-2006-0175	Socket Telecom, L.L.C. (Amendment to interconnection agreement with CenturyTel of Missouri, L.L.C., and interim arrangement with Spectra Communications Group, L.L.C., approved).....	11/30/05
TK-2006-0228	Socket Telecom, LLC (Directory services agreement with CenturyTel, approved).....	12/30/05
PD-2006-0137	Sonnier, Barb d/b/a DBS (Certificate of service authority, pay phones, canceled).....	10/13/05
WD-2006-0157	South Jefferson County Utility Company (Transfer of assets to Summer Set Property Owners Association, approved).....	3/21/06
GR-2005-0279	Southern Missouri Gas Company, L.P. (2004-2005 Actual Cost Adjustment case, order establishing ACA balance and closing case).....	5/25/06
GE-2006-0189	Southern Missouri Gas Company, L.P. (Variance from 4 CSR 240-14.020(1)(E), (F) and (H), granted).....	12/20/05
GE-2006-0156	Southern Missouri Gas Company, L.P. (Variance from 4 CSR 240-14.020(1)(D), granted).....	12/20/05
SD-2006-0440	Southwest Sewer Corporation (Certificates of convenience and necessity to provide sewer service to several subdivisions in southwestern Missouri, order granting motion to nullify certificates of convenience and necessity and cancel accompanying tariff).....	6/22/06
TO-2006-0231	Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (Order granting additional number resources).....	12/13/05
TK-2006-0344	Southwestern Bell Telephone Company, L.P., d/b/a AT&T Missouri (Amendment to interconnection agreement with Xspedius Management Co. Switched Services, L.L.C., and Xspedius Management Co. of Kansas City, L.L.C., approved).....	4/3/06
TK-2006-0385	Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri (Interconnection agreement with McLeodUSA Telecommunications Services, Inc., order approving amendment to interconnection agreement).....	5/12/06
TO-2006-0247	Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri (Order reversing decision of the North American Numbering Plan Administrator and closing case).....	12/29/05
TK-2006-0050	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with the MCI Group, including MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, L.L.C., order approving errata and modifying order approving arbitrated interconnection agreement).....	9/2/05

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TK-2006-0047	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Arbitrated interconnection agreement with Charter FiberLink, Missouri, LLC, order approving second joint errata and modifying order approving arbitrated interconnection agreement).....	9/7/05
TK-2006-0073	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Big River Telephone Company, LLC, order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TK-2006-0072	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with NuVox Communications of Missouri, Inc., order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TK-2006-0071	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Socket Telecom, L.L.C., order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TK-2006-0070	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with XO Communications Services, Inc. and XO Missouri, Inc., order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TK-2006-0050	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with MCI Group, including MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, L.L.C., second order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TK-2006-0048	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Birch Telecom of Missouri, Inc. and Ionex communications, Inc., order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TK-2006-0043	Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (Interconnection agreement with Xspedius Management Co. of Kansas City L.L.C. and Xspedius Management Co. Switched Services, L.L.C., order approving errata and modifying order approving arbitrated interconnection agreement).....	10/25/05
TO-2006-0298	Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (Amendment to interconnection agreement with XO Communications Services, Inc., approved).....	1/13/06
TK-2007-0019	Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (Interconnection agreement with Birch Telecom of Missouri and Ionex Communications, Inc., amendment to agreement, approved).....	8/22/06
TK-2006-0262	Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (Interconnection agreement with Camarato Distributing, Inc., approved).....	3/14/06

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TO-2006-0336	Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (Seeking reversal of the North American Numbering Plan Administrator's decision to deny request for additional numbering resources, order granting additional numbering resources).....	3/16/06
TO-2006-0335	Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (Seeking reversal of the North American Numbering Plan Administrator's decision to deny request for additional numbering resources, order granting additional numbering resources).....	3/16/06
TK-2006-0039	Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (Interconnection agreements with MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., Intermedia Communications, Inc. and Brooks Fiber Communications, Inc., order approving amendment to interconnection agreements, approved)...	10/25/05
TO-2006-0254	Sprint Communications Company, L.P. (Transfer of UNE-P customers to Trinsic Communications, Inc., approved)..	1/12/06
LA-2006-0075	Sprint Long Distance, Inc. (Certificate of service authority, IXC, approved).....	9/19/05
TK-2006-0208	Sprint Missouri Inc., d/b/a Sprint (Interconnection agreement with Comcast Phone of Missouri, LLC, d/b/a Comcast Digital Phone, approved).....	12/16/05
IK-2006-0144	Sprint Missouri, Inc. (Interconnection agreement with Big River Telephone Company, LLC, approved).....	11/10/05
IK-2006-0054	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Missouri Network Alliance, LLC, approved).....	9/21/05
CO-2005-0039	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Socket Telecom, LLC, approved).....	12/12/05
TK-2006-0236	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Fidelity Communication Services I, Inc., approved).....	1/4/06
TN-2006-0411	Sprint Payphone Services, Inc. (Name change to Embarq Payphone Services, Inc., recognized).....	5/24/06
PD-2006-0447	St. Joe Inn, Inc. d/b/a Days Inn; T&T Communications, LLC; BNL Communications, Inc.; and Data Tel Communications, LLC (Certificates of service authority, pay phone, canceled).....	6/6/06
PD-2005-0235	Stanfield, David E. (Certificate of service authority, pay phones, canceled).....	12/15/05
TO-2006-0234	Steelville Telephone Exchange, Inc. (Interconnection agreement with United States Cellular Corporation, approved).....	1/3/06
TO-2004-0454	Steelville Telephone Exchange, Inc. (Order clarifying continuing obligations concerning intermodal number portability and closing case).....	7/3/06
TD-2006-0136	Steve's Wildcat Web, Inc. (Certificate of service authority, IXC and basic local exchange service, canceled).....	10/13/05
PD-2006-0252	Stimage, Johnny J. (Certificate of service authority, pay phones, canceled).....	12/28/05

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WR-2006-0091	Stockton Hills Water Company (Rate case, order approving agreement).....	9/29/05
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SR-2006-0379	Taneycomo Highlands, Inc. (Rate increase for sewer service, approved).....	6/27/06
TM-2006-0433	TelCove Inc. (Transfer of control of TelCove Operations, Inc. to Level 3 Communications, Inc. and related transactions, order dismissing joint application due to a lack of jurisdiction).....	6/13/06
TK-2006-0296	TelCove Operations, Inc. (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, approved).....	3/6/06
XD-2006-0392	Telecom Resources, Inc. d/b/a TRINetwork, Inc. (Certificate of service authority, IXC, canceled).....	4/25/06
XD-2006-0441	Telefyne Incorporated (Certificate of service authority, IXC, canceled).....	6/27/06
XD-2005-0118	Teleglobe America, Inc. (Certificate of service authority, IXC and non-switched local telecommunications service, canceled).....	10/19/05
PD-2006-0137	Tension Envelope Corporation (Certificate of service authority, pay phones, canceled).....	10/13/05
WR-2006-0215	The Empire District Electric Company (Small company water rate increase request, approved).....	1/31/06
TO-2006-0217	The Phone Connection, Inc. (Amendment to interconnection agreement with Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri, approved).....	1/13/06
PD-2006-0027	Thebeau, Robert A. (Certificate of service authority, pay phones, canceled).....	10/17/05
PD-2006-0252	Thomas, Dan R. d/b/a PH4 Technologies (Certificate of service authority, pay phones, canceled).....	12/28/05
WC-2006-0423	Thomas, Erik M. v. Evergreen Lake Water Company (Complaint case, order granting relief and denying motion to set aside default).....	8/31/06
PD-2006-0137	Thompson, Kevin E. (Certificate of service authority, pay phones, canceled).....	10/13/05
SA-2005-0297	Timber Creek Sewer Company (Certificate of convenience and necessity, construct and operate a sewer system in an unincorporated area of Clay County, Oakbrook subdivision, granted).....	1/5/06
SA-2005-0467	Timber Creek Sewer Company (Certificate of convenience and necessity, construct and operate a sewer system in an unincorporated area of Clay County, Johnson Ridge subdivision, granted).....	1/5/06
XA-2006-0405	Toly Digital Networks, Inc. (Certificate of service authority, IXC, granted).....	5/22/06
XD-2006-0115	Tralee Telephone Company, LLC (Certificate of service authority, IXC, canceled).....	9/26/05
CK-2006-0475	Trans National Communications International, Inc. (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, approved).....	7/27/06

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XD-2006-0218	Transcommunications, Inc. (Certificate of service authority, IXC, canceled).....	12/5/05
HA-2006-0294	Trigen-Kansas City Energy Corporation (Certificate of public convenience and necessity to provide steam heat to an expanded service area in Kansas City, Missouri, Report and Order).....	5/25/06
WA-2006-0241	Tri-State Utility, Inc. (Certificate of convenience and necessity, extension of service area in an unincorporated area of Taney County, approved).....	4/27/06
PD-2006-0028	TSC Payphone Corp. (Certificate of service authority, pay phones, canceled).....	10/17/05
PD-2005-0235	Tscharner, David J. (Certificate of service authority, pay phones, canceled).....	12/15/05
PD-2006-0447	T&T Communications, LLC; St. Joe Inn, Inc. d/b/a Days Inn; BNL Communications, Inc.; and Data Tel Communications, LLC (Certificates of service authority, pay phone, canceled).....	6/6/06
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TD-2006-0280	U.S. TelePacific Corp. d/b/a TelePacific Communications (Certificate of service authority, IXC, basic local and local exchange, canceled).....	1/5/06
EO-2006-0554	Uhrhan, Cletus (Change of electric supplier from Union Electric Company d/b/a AmerenUE to Jackson Electric Distribution Department, granted).....	8/22/06
PD-2006-0137	Underwood, Kevin S. (Certificate of service authority, pay phones, canceled).....	10/13/05
GR-2005-0102	Union Electric Company d/b/a AmerenUE (2003-2004 Actual Cost Adjustment, order adopting PSC Staff recommendation and requiring adjustment of ACA balance).....	3/16/06
ED-2006-0117	Union Electric Company d/b/a AmerenUE (Certificate of public convenience and necessity, steam service, canceled).....	3/30/06
EO-2006-0098	Union Electric Company d/b/a AmerenUE (Order approving decommissioning cost estimate for Callaway Plant and funding level of Nuclear Decommissioning Trust Fund).....	12/29/05
EE-2006-0124	Union Electric Company d/b/a AmerenUE (Request for variance from separate meter reading requirement, granted).....	11/17/05
EO-2006-0096	Union Electric Company d/b/a AmerenUE (Territorial agreement with Macon Electric Cooperative, addendum to agreement, approved).....	10/25/05
LA-2006-0119	Unite Private Networks, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted).....	11/2/05
PD-2006-0028	Universal Communications, Inc. (Certificate of service authority, pay phones, canceled).....	10/17/05

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LD-2006-0397	UpLync Telecommunications, Inc. (Certificate of service authority, IXC, basic local and non-switched local telecommunications services, canceled).....	4/25/06
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TM-2006-0186	VarTec Telecom Inc. d/b/a Clear Choice Communications (Certificate of service authority, IXC, canceled).....	6/28/06
TM-2006-0186	VarTec Telecom, Inc. (Certificate of service authority, local exchange and interexchange services, canceled).....	6/27/06
TM-2006-0186	VarTec Solutions, Inc. (Certificate of service authority, local exchange and interexchange services, canceled).....	6/27/06
CA-2006-0323	VCI Company (Certificate of service authority, basic local telecommunications services, granted).....	3/31/06
PD-2006-0261	Veselka, Randall D. (Certificate of service authority, pay phones, canceled).....	1/27/06
CK-2006-0446	VIC Company (Interconnection agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, approved).....	7/11/06
PD-2006-0442	Veach, Nathan; Felten, Alan Ray; Jim Ecton d/b/a JSE Enterprises; Catherine A. Ragland; Desh V. Anand; John B. Degraffenreid; Thomas Parr; Todd R. Prother (Certificate of service authority, pay phones, canceled).....	6/29/06
XA-2006-0178	Voicecom Telecommunications, LLC (Certificate of service authority, IXC, granted).....	11/29/05
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XD-2006-0470	W2COM International, LLC (Certificate of service authority, IXC, canceled).....	7/12/06
PD-2005-0235	Warren, Jeff C. (Certificate of service authority, pay phones, canceled).....	12/15/05
LN-2006-0427	Western Communications, Inc. (Name change to Logix Communications, L.P., acknowledged).....	5/25/06
PD-2006-0261	Wharry, Craig, d/b/a Y.A.P. Communications (Certificate of service authority, pay phones, canceled).....	1/27/06
PD-2006-0261	Whelan, Robert (Certificate of service authority, pay phones, canceled).....	1/27/06
PD-2006-0252	Whiteaker, Pat (Certificate of service authority, pay phones, canceled).....	12/28/05
PD-2005-0235	Winston, Albert (Certificate of service authority, pay phones, canceled).....	12/15/05
EO-2006-0555	Withers, Greg (Change of electric supplier from Union Electric Company d/b/a AmerenUE to Jackson Electric Distribution Department, granted).....	8/22/06
PD-2005-0235	Wolf, Clarence G. Jr. (Certificate of service authority, pay phones, canceled).....	12/15/05

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WD-2006-0393	Woodland Heights Utilities, Inc. (Certificate of public convenience and necessity, water and sewer service to the Woodland Heights subdivision near Sullivan, Missouri, canceled).....	5/23/06
PD-2006-0273	Wright, Calvin Wayne d/b/a E-Tech Terminals (Certificate of service authority, pay phones, canceled).....	12/27/05
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CA-2006-0373	YMax Communications Corp. (Certificate of service authority, basic local exchange telecommunications services, granted).....	5/25/06
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PD-2005-0235	Zabawa, David W. (Certificate of service authority, pay phones, canceled).....	12/15/05

**REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI**

**In the Matter of the Application of Missouri Gas Energy, a
Division of Southern Union Company, for an Accounting
Authority Order Concerning the Kansas Property Tax for
Gas in Storage.**

*Case No. GU-2005-0095
Decided September 8, 2005*

Accounting §42. Gas §34. Based on the Sibley standard that the Commission has applied to requests for accounting authority orders for fifteen years, an accounting authority order is appropriate if the applicant demonstrates that the costs to be deferred are "extraordinary, unusual and unique, and not recurring."

Accounting §§38, 42. Gas §34. The Commission authorized an accounting authority order to permit a gas company to defer the cost of property taxes imposed by the state of Kansas while the company challenged the legality of the taxes in the Kansas courts.

Accounting §38. Taxes assessed under a statute of questionable constitutionality were not "known" so as to be includable in a gas company's rates while the constitutionality of the tax was being challenged in court.

Accounting §42. Gas §34. An accounting authority order is not a guarantee that the company will be able to recover all of its deferred expenses in rates.

Accounting §42. Gas §34. Any accounting authority order creates a mismatch between the customers who benefit from the expenditure and the customers who will be required to pay those costs. For that reason a deferral should not be allowed to continue any longer than necessary.

APPEARANCES

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Thomas R. Schwarz, Jr., Deputy General Counsel, *Robert Berlin*, Assistant General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission

REGULATORY LAW JUDGE: **Morris L. Woodruff**

REPORT AND ORDER**Summary**

This report and order grants Missouri Gas Energy an Accounting Authority Order to permit it to defer its expenses incurred to pay property taxes on natural gas held in storage in the state of Kansas. Missouri Gas Energy will be allowed to defer taxes paid for tax years 2004, 2005, and 2006. The company will be required to begin amortization of the deferred amounts at the beginning of the month following a final judicial determination of the legality of the Kansas property taxes. Amortization must occur over a five-year period.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On October 10, 2004, Missouri Gas Energy, a division of Southern Union Company (MGE), filed an application for an accounting authority order (AAO) that would authorize deferred accounting treatment for certain new property taxes incurred by MGE in the state of Kansas for natural gas held in storage in that state. On October 14, the Commission issued notice of MGE's application and established November 4 as the deadline for the submission of applications to intervene. A timely application to intervene was filed by the Midwest Gas Users' Association.¹ The Commission allowed that organization to intervene on November 9.

The parties prefiled direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on March 8, 2005. Initial post-hearing briefs were submitted on April 26, with reply briefs filed May 10. Midwest Gas Users' Association did not participate in the hearing and did not file briefs.

Overview

MGE is a division of Southern Union Company. As a division, MGE has no separate corporate existence apart from Southern Union. MGE's divisional headquarters is located in Kansas City, Missouri, and it provides natural gas service to customers in Kansas City, Joplin, St. Joseph, and other smaller cities in the western half of Missouri. MGE does not serve customers in the state of Kansas. MGE is a local distribution company, sometimes referred to by the acronym LDC. That means that MGE purchases natural gas from a supplier, pays to transport the gas to Missouri over one or more interstate pipelines, and then distributes the natural gas to its customers in this state.

¹ The Midwest Gas Users' Association is an unincorporated non-profit association consisting of and representing business concerns and corporations that are substantial users of natural gas.

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As a part of its routine operations, MGE keeps a portion of its natural gas supply in storage in underground formations in the state of Kansas. In June of 2004, the Kansas legislature enacted a law that permits Kansas counties to assess property taxes against the value of natural gas held in storage in that county.²

The law enacted in 2004 was not Kansas' first attempt to tax natural gas held in storage in that state. Kansas had attempted to assess and collect property taxes on such gas before 2003. However, in October 2003, the Kansas Supreme Court issued a decision, in an appeal brought by MGE and other companies, in which it held that out-of-state natural gas distributors, such as MGE, were entitled to a merchant's inventory exemption from the property tax by the terms of the Kansas constitution.³ The 2004 law was enacted as an attempt to close that loophole.

Before it successfully obtained an exemption to the Kansas property tax on gas in storage as a result of the Kansas Supreme Court decision, MGE had anticipated including that tax in its cost of service for the purpose of calculating its rates. In the rate case filed in 2000 – Case No. GR-2001-292 – the Commission's Staff included \$400,000 for payment of Kansas property taxes in its calculation of MGE's annual revenue requirement.⁴ However, that case was settled by a stipulation and agreement among the parties by which they agreed upon an appropriate dollar amount of revenue to allow MGE to recover in its rates. The settlement did not specify the individual items that went into the revenue requirement and Kansas property taxes never became an issue.⁵

MGE filed its next rate case – Case No. GR-2004-0209 – in November 2003. At that time, Kansas was not imposing a property tax on storage gas. As a result, such a tax was not included in any party's calculation of MGE's revenue requirement relating to property taxes. A contested hearing was held in GR-2004-0209 from June 21 through July 2, 2004. Because the Kansas legislature did not pass a statute that attempted to reimpose the property tax until that hearing was underway, the tax never became an issue at that stage of the hearing.

The hearing did not, however, end on July 2. On July 23, 2004, the Commission held a "true-up" hearing in GR-2004-0209 for the purpose of updating certain costs on several issues identified by the parties before the main hearing. Property taxes were not identified as a true-up issue.⁶ Nevertheless, MGE attempted to include the additional costs it would incur as a result of the newly imposed Kansas property taxes in its revenue requirement for the first time at the true-up hearing.

² House Substitute for Senate Bill No. 147, Noack Revised Schedule MRN-1, Ex.4.

³ *In the Matter of the Application of Central Illinois Public Services Company*, 276 Kan 612, 78 P.3d 419 (2003) That decision contains an extensive discussion of the history of the tax on natural gas held in storage in Kansas. In brief, before 1999 Kansas counties were able to collect such taxes from the interstate pipeline companies that held title to the storage gas. In 1999, the FERC issued Order 636 that unbundled the interstate pipeline industry and prohibited the interstate pipeline companies from holding title to the storage gas. The Kansas Supreme Court's decision held that the out-state gas distribution companies, such as MGE, that now held title to the storage gas, did not meet the Kansas constitution's definition of a utility and as a result, MGE and the other plaintiff's were entitled to an exemption from the tax.

⁴ Transcript page 108, lines 7-25.

⁵ Transcript page 208, lines 18-22. The entire stipulation and agreement is exhibit 17.

⁶ Transcript, pages 48-53.

At the true-up hearing in GR-2004-0209, the Commission's Staff argued that while the new Kansas property taxes should not be included in MGE's revenue requirement for that case, it would be appropriate for the Commission to grant MGE an AAO to allow those new taxes to be deferred for consideration in a future rate case. MGE indicated that it was willing to accept an AAO as a substitute for immediate inclusion of the taxes in the company's revenue requirement. Public Counsel and other parties to that rate case flatly opposed both the inclusion of the Kansas taxes in the revenue requirement and the issuance of an AAO.

In its Report and Order in GR-2004-0209, issued September 21, 2004, the Commission held that the new Kansas property taxes could not be included in MGE's revenue requirement for that case. As the basis for that decision, the Commission indicated that MGE's potential tax liability was not currently known or measurable. As a further basis for its decision, the Commission found that property taxes had not been included as a true-up issue and as a result, opposing parties had not received adequate notice of that issue, or of the question of the issuance of an AAO, to allow those issues to be considered in that case. The Commission did, however, indicate that if MGE wished to request an AAO, it should file a separate application, to which the Commission would give due consideration. The application for an AAO that is the subject of this case followed a few weeks later.

The Specifics of the Requested AAO

The amount of taxes assessed to MGE by Kansas is based on the value of the gas in storage as of December 31 for each year. Because it is based on the value of the stored gas, the amount of tax owed will fluctuate in future years as the value of the gas goes up and down.⁷ For 2004, the first year for which the tax will be owed, MGE has been assessed and billed a total of \$1,721,830.⁸ The full amount of the assessed and billed taxes have been recorded on MGE's books as an expense as of December 2004.⁹

The amount of taxes that Kansas seeks to impose on MGE is substantial in relation to MGE's annual income. The amount assessed for taxes in 2004 represents 9.03% of MGE's net income for 2004.¹⁰ MGE has a history of failing to earn its allowed rate of return and if it is unable to recover the cost of paying the Kansas property taxes it is even less likely to earn the rate of return that the Commission authorized in the company's most recent rate case.¹¹

MGE has appealed its tax bill to the Kansas Board of Tax Appeals, as well as to the Kansas courts.¹² As a result, although the full amount of taxes for 2004 have been recorded as an expense on MGE's books, MGE will not actually have to pay

⁷ Transcript, page 63, lines 3-8.

⁸ Noack Direct, Ex. 1, page 3, lines 1-4.

⁹ Noack Direct, Ex. 1, page 3, lines 11-14.

¹⁰ Noack Direct, Ex. 1, page 6, lines 18-20.

¹¹ Noack Direct, Ex. 1, Page 7, lines 12-21.

¹² See Exhibit 12.

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the assessed taxes until after its scheduled hearing with the Board of Tax Appeals.¹³ MGE anticipates receiving a final decision on its tax appeal in mid-2006.¹⁴

If the Commission grants the AAO that MGE requests, MGE would move the Kansas taxes that are currently booked as expenses into a deferred account. If MGE is successful in overturning the Kansas tax, then the deferred amounts would simply be written off against the payable that is also booked, with no effect on the companies earnings.¹⁵ If, on the other hand, the legality and constitutionality of the Kansas tax is upheld, MGE would be able to ask the Commission to allow it to recover those deferred costs in its next rate case. Of course, if the Kansas property taxes are upheld, MGE would also be responsible for paying those taxes in future years.

Generally, the property taxes paid by a utility are considered to be a cost of doing business. The utility is allowed to recover those costs from its customers when those costs are included in the company's cost of service, which is used to establish the rates that the company will be allowed to charge. For example, MGE's cost of service established in its most recent rate case, GR-2004-0209, includes a normalized amount for payment of Missouri property taxes. If MGE were to file a new rate case, an estimation of the amount of Kansas property taxes MGE would be required to pay could simply be added to the existing property tax amount and those additional costs would be recovered from ratepayers. In that circumstance, there would be no need for an AAO.

There are, however, a couple of barriers that will make it difficult for MGE to recover for the Kansas taxes that it must pay simply by filing a new rate case. First, rate cases are expensive. For its last rate case, which ended in October 2004, MGE was allowed to recover nearly \$900,000 from its ratepayers, amortized over a three-year period.¹⁶ Filing a new rate case to recover the cost of paying the Kansas property taxes so soon after MGE's last rate case would impose a substantial financial cost on MGE's ratepayers.

The second barrier to recovering the Kansas property tax costs through a new rate case results from the uncertainty regarding the legality of the imposition of those taxes against MGE. For a cost to be included in a utility's cost of service for the purpose of calculating the utility's rates, that cost must be both known and measurable.

MGE's Kansas property tax bill is currently measurable; MGE knows how much it has been told to pay. But until it is finally determined whether MGE will be required to pay the tax, the actual cost cannot be said to be known. If, in a new rate case, the Commission were to allow MGE to recover the cost of the Kansas taxes, those costs would be built into the company's rates and would result in higher rates charged to customers. If the Kansas taxes were then set aside, the higher rates would remain in effect, even though the higher costs had gone away. The result could be a windfall for the company and a detriment to ratepayers. For that reason, both

¹³ Transcript, page 54, lines 8-10.

¹⁴ Transcript, page 79, lines 6-12.

¹⁵ Transcript page 63, lines 12-23.

¹⁶ Transcript, pages 64-65, lines 17-25, 1-2.

Public Counsel and Staff indicate that they would oppose inclusion of the cost of paying Kansas property taxes in MGE's cost of service until the question of the legality of those taxes has been finally resolved.

Amortization

Assuming that MGE is allowed to defer the cost of paying its Kansas property taxes through an AAO, an additional issue arises concerning the amortization of that expense. It would not be appropriate to allow MGE, or any other utility, to defer an expense forever. At some point, the regulatory asset that is created through an AAO must be recognized as an expense. Usually that asset is turned back into an expense over a period of years through an amortization process. In other words, a percentage of the total cost is recognized as an expense in each subsequent year.

Once amortization begins the utility starts to lose the benefit of the AAO unless that expense is recognized in the company's rates through the filing of a rate case. It is entirely possible that a deferred expense could be amortized out of existence before a company chooses to file a rate case. Indeed, that might be an appropriate result if the company is earning enough income to offset the deferred expenses so that it is earning a sufficient return without a rate increase.

MGE originally proposed that the amortization of the Kansas property tax expense begin on the effective date of the report and order in MGE's next general rate case.¹⁷ Subsequently, in response to Staff's concern that a limit should be placed on the amount of time that the property tax asset could accrue on MGE's books, MGE proposed that if it has not filed its next rate case by May 31, 2008, it would cease further deferrals and begin amortizing the deferred taxes beginning June 1, 2008, with the amortization occurring over a five-year period.¹⁸

Staff countered that MGE should be required to begin amortizing the deferred Kansas property tax expenses beginning the month after the final judicial resolution of the legality of the Kansas tax. Staff agrees with MGE that the amortization should occur over a five-year period.¹⁹ In addition, Staff would limit the amount of taxes that MGE could defer under the AAO to the taxes paid for the years 2004 and 2005.²⁰ Although Public Counsel opposes the granting of an AAO, if such an AAO is granted, it supports Staff's proposal regarding the period of deferral and amortization.²¹

MGE estimated that under Staff's proposal it would be required to amortize approximately \$57,000 per month once amortization began.²² Unless MGE is able to incorporate that expense into its rates through a rate case by the time amortization begins, it will not be able to recover that expense from its ratepayers. Assuming that a final judicial decision on the legality of the Kansas property taxes will be obtained sometime in the summer of 2006, and that a rate case would need to be

¹⁷ Noack Direct, Ex. 1, page 8, lines 12-14.

¹⁸ Noack Rebuttal, Ex. 2, page 4, lines 10-16.

¹⁹ Hyneman Direct, Ex. 5, page 3, lines 3-6.

²⁰ Hyneman Surrebuttal, Ex. 6, page 2, lines 3-7.

²¹ Bolin Rebuttal, Ex. 7, pages 12-13, lines 20-22, 1-20.

²² Noack Rebuttal, Ex. 2, page 3, line 18.

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filed eleven months before the proposed rates could go into effect, under Staff's proposal, MGE would need to file a rate case in the late summer of 2005 if it is to recover all of the deferred expenses.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

MGE is a public utility, and a gas corporation, as those terms are defined in Section 386.020(42) and (18), RSMo 2000. As such, MGE is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

The Standard for Granting an AAO

As a gas company subject to the Commission's jurisdiction, MGE is required by regulation to keep all its accounts in conformity with the Uniform System of Accounts (USOA) prescribed by the Federal Energy Regulatory Commission.²³ In general, the USOA requires that a company's net income reflect all items of profit or loss occurring during the period. The USOA, however, recognizes that special accounting treatment, what this Commission refers to as an AAO, may be appropriate when accounting for extraordinary items of profit or loss. The question then becomes, what is an extraordinary item?

The USOA indicates that an extraordinary item for which special accounting treatment would be appropriate is "of unusual nature and infrequent occurrence." Furthermore, "they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future." In addition, the USOA requires that to be considered extraordinary, the item "should be more than approximately 5 percent of income, computed before extraordinary items."²⁴

The Commission has also established a test to determine when an AAO should be granted. In a 1991 decision, often referred to as the Sibley case,²⁵ the Commission stated that it would consider the appropriateness of granting an AAO on a case by case basis. In doing so, it would approve an AAO for events that it found to be "extraordinary, unusual and unique, and not recurring."²⁶ The Commission's decision in the Sibley case was subsequently affirmed by the Missouri Court of Appeals.²⁷

The classic example of an event that would be extraordinary, unusual and unique, and not recurring would be a fire, or flood, or ice storm that causes a large

²³ 4 CSR 240-40.040. The USOA for gas companies is found at 18 CFR part 201.

²⁴ 18 CFR part 201, general instruction 7.

²⁵ *In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations. In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments.* 1 MPSC 3d 200 (1991).

²⁶ *Id.* at 205.

²⁷ *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W. 2d 806 (Mo. App. W.D. 1993).

amount of damage to the utility's property. In those circumstances, it is generally agreed that the company should be permitted to defer the costs related to that extraordinary event through an AAO.²⁸ However, the Commission has never limited the granting of an AAO to expenses resulting from such natural catastrophes.

On the contrary, the Commission has found that an AAO would be appropriate in a wide variety of circumstances. For example, in the Sibley case – the case in which the Commission set out its standards for the granting of an AAO – the Commission approved an AAO for the deferral of costs relating to refurbishment of the company's coal-fired generating plant.²⁹ Similarly, the Commission has granted an AAO for the deferral of costs related to a company's compliance with changed accounting standards,³⁰ and for a company's costs incurred to enhance security after the terrorist attacks of September 11, 2001.³¹

On several occasions, the Commission has granted AAOs authorizing deferral of costs relating to actions that a utility has been required to take as a result of governmental orders, regulations, or statutes. For example, the Commission has granted AAOs for costs related to a company's compliance with emergency amendments to the Commission's cold weather rule,³² and for expenses related to a company's compliance with a gas safety line replacement program.³³

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

²⁸ For an example see: *In the Matter of Aquila Inc.'s Application for the Issuance of an Accounting Authority Order Relating to its Electrical Operations in the Aquila Networks-MPS Division as a Result of a Severe Ice Storm*. Order Granting Accounting Authority Order, Case No. EU-2002-1053 (June 27, 2002)

²⁹ *In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations*. *In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments*. 1 MPSC 3d 200 (1991)

³⁰ *In the Matter of the Application of Union Electric Company for an Accounting Authority Order*. 1 MPSC 3d 329 (1992)

³¹ *In the Matter of the Joint Application of Missouri-American Water Company, St. Louis Water Company, d/b/a Missouri-American Water Company, and Jefferson City Water Works Company, d/b/a Missouri-American Water Company, for an Accounting Authority Order Relating to Security Costs*. Report and Order on Remand, Case No. WO-2002-273 (November 10, 2004)

³² *In the Matter of the Application of UtiliCorp United, Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company for an Accounting Authority Order Relating to Commission Rule 4 CSR 240-13.055(13)*. 11 MPSC 3d 78 (2002), and *In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Relating to Commission Rule 4 CSR 240-13.055(13)*, 11 MPSC 3d 317 (2002)

³³ *In the Matter of the Tariff Revisions of Missouri Gas Energy, a Division of Southern Union Company, Designed to Increase Rates for Natural Gas Service to Customers in the Missouri Service Area of the Company*. 10 MPSC 3d 369 (2001).

The Granting of an AAO is Appropriate

Based on the Sibley standard that the Commission has applied to requests for AAOs for the last fifteen years, an AAO is appropriate if MGE demonstrates that the costs to be deferred are “extraordinary, unusual and unique, and not recurring.” In this case, the costs that MGE seeks to defer are property taxes. In most cases, the payment of property taxes by a utility would not be a fit subject for an AAO. MGE, like all investor-owned utilities, routinely pays property taxes. Again, like all other investor-owned utilities, MGE is routinely allowed to recover the taxes it pays from its ratepayers through the inclusion of those tax payments in its cost of service when its rates are calculated in a rate case.

The Kansas property tax on gas held in storage in that state is unusual in that MGE, which does not serve customers in Kansas, has never before had to pay property tax in Kansas. However, if the Kansas taxes are found to be legal in the ongoing court challenge, and MGE is required to pay the tax, it should be able to recover those tax payments for future years through its rates when it includes those taxes in its cost of service in a future rate case.

The problem is that, at the moment, MGE could not include the Kansas taxes in its cost of service even if it were to immediately file a new rate case. As a general rule, for an item of cost to be included in a utility's cost of service, that item of cost must be both known and measurable. A utility's customers should not be expected to pay, through their rates, for costs that are speculative and might never actually be incurred. MGE's Kansas tax liability is now measurable – it has received a bill from the Kansas tax authorities for the 2004 year, and future tax bills can be estimated – but its Kansas tax liability is not yet known because of the uncertainty resulting from the ongoing legal challenge. If MGE prevails in court, it may never have to pay the Kansas property taxes.

The amount of taxes that MGE might have to pay in Kansas is significant, both to MGE and to its ratepayers. It would not be appropriate to allow MGE to recover millions of dollars from its ratepayers for taxes that it might never have to pay. On the other hand, these taxes are a legitimate cost of doing business for which the ratepayers should be responsible. It would not be fair to MGE's shareholders to shift that burden on to them if those taxes ultimately must be paid. Furthermore, it was MGE's decision to challenge the legality of the Kansas taxes, a decision that could greatly benefit its ratepayers, that has placed MGE in this difficult position. If MGE had accepted the Kansas taxes without challenge, it could have simply passed the added taxes on to its ratepayers by filing a rate case. Instead, by looking out for the interest of its ratepayers, it has created the possibility that it will not be able to recover several million dollars to which it would otherwise be entitled. It is that conundrum that makes an AAO the appropriate means for dealing with the potential Kansas tax liability.

By granting MGE an AAO, it will be allowed to defer the cost of paying the Kansas property taxes for consideration in a future rate case after the legality of those taxes is determined and the costs are known and measurable. If those taxes are found to be illegal and MGE does not have to pay them, then the deferred amounts will simply be written off the balance sheet and neither the ratepayers nor the shareholders will be harmed. If, on the other hand, MGE ultimately must pay the

taxes, it will be able to make its case for the inclusion of its additional tax liability into its cost of service in a future rate case.

This uncertainty surrounding MGE's obligation to pay a significant amount of taxes is an unusual and unique situation that is not likely to recur. As such it meets the Sibley standard for the granting of an AAO and the granting of such an AAO is appropriate.

The Period of Deferral and Amortization

The Commission has found that an AAO should be granted to allow MGE to defer recognition of its Kansas property tax obligations because of the uncertainty surrounding its ultimate obligation to pay those taxes. Once the legality of those taxes is resolved by the appropriate court, that uncertainty goes away and the Kansas property taxes become just another item of expense. At that point the need for the AAO also goes away and the deferral must end.

MGE argues that the deferral should be allowed to continue until it is in a position to file its next rate case because otherwise it will not be able to recover the full amount of the deferred expenses from its customers in rates. That argument is not compelling because an AAO is not a guarantee that the company will be able to recover all of its deferred expenses in rates. Indeed, under some circumstances the expenses deferred under an AAO may never be recovered in rates. If MGE wishes to recover its Kansas property tax expenses in its rates, it controls the date when it will file a rate case. Once the uncertainty surrounding the Kansas property taxes is judicially resolved, MGE is free to file a rate case at a date of its choosing to attempt to recover those costs. It would not be appropriate to continue the deferral just to allow MGE more time to file a rate case.

Furthermore, an extended deferral period increases the mismatch between the customers who benefit from the payment of the Kansas property taxes, and the customers who will be asked to pay for those costs. Obviously, MGE had customers in 2004 who will no longer be customers in 2008. The reverse is also true. MGE will have customers in 2008 who were not customers in 2004. By deferring costs from 2004 to 2008, the customers of 2008 will be required to subsidize the customers of 2004.

Any AAO creates a mismatch and resulting subsidization. For that reason, the deferral should not be allowed to continue any longer than necessary. An inappropriately long deferral period will only increase the mismatch. Since several million dollars would be deferred each year under the AAO, each year of deferral will substantially increase the subsidization.

For those reasons, the Commission agrees with Staff's position and will require MGE to start amortization of the deferred Kansas property tax expense beginning the month after the final judicial resolution of the legality of that tax.

In addition to requiring that MGE start amortization of the deferred Kansas property tax expenses promptly after final determination of the legality of that tax, Staff proposes that the company be allowed to defer only two years of taxes. In other words, MGE would be allowed to defer Kansas property taxes only for the 2004 and 2005 tax years. However, since a judicial decision regarding the legality of the tax is not expected until the summer of 2006, a two-year limit on deferral of those expenses would unfairly deny MGE a portion of the benefit of the AAO. Therefore,

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the Commission will allow MGE to defer Kansas tax expenses for three years, 2004, 2005, and 2006.

IT IS THEREFORE ORDERED:

1. That Missouri Gas Energy, a division of Southern Union Company, is granted an Accounting Authority Order whereby the company is authorized to record on its books a regulatory asset, which represents the expenses associated with the property tax to be paid to the state of Kansas pursuant to Senate Bill 147 for tax years 2004, 2005, and 2006. Missouri Gas Energy may maintain this regulatory asset on its books until the beginning of the month after the final judicial resolution of the legality of that tax. Thereafter, Missouri Gas Energy shall commence amortization of the deferred amounts, with the amortization to be completed over a five-year period.
2. That nothing in this order shall be considered a finding by the Commission of the value or prudence for ratemaking purposes of the properties, transactions, and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions, and expenditures herein involved in a later proceeding.
3. That any pending motions that the Commission has not specifically ruled upon are denied.
4. That this report and order shall become effective on September 18, 2005.

Davis, Chm., Murray and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
certify compliance with the
provisions of Section 536.080, RSMo 2000.

**In the Matter of the Application of Sprint Missouri, Inc., for
Competitive Classification Under Section 392.245.5, RSMo
(2005).**

*Case No. IO-2006-0092
Decided September 22, 2005*

Telecommunications §40. The Commission grants Sprint Missouri's request for competitive classification pursuant to Section 392.245.5 RSMo(2005), for residential services, other than exchange access service, for the Ferrelview, Platte City, and Weston exchanges. The Commission also grants competitive classification for business services, other than exchange access service, in the Ferrelview, Platte City, St. Robert, and Waynesville exchanges.

Appearances

Brett D. Leopold, Attorney at Law, Sprint Missouri, Inc., d/b/a Sprint, 6450 Sprint Parkway, KSOPHN0212-2A353, Overland Park, Kansas 66251, for Sprint Missouri, Inc., d/b/a Sprint.

Jason L. Ross, Greensfelder, Hemker & Gale, P.C., 10 South Broadway, Suite 2000, St. Louis, Missouri 63102, for Fidelity Communication Services I, Inc.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Nancy Dippell, Senior Regulatory Law Judge.**

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants Sprint Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo (2005), for residential services, other than exchange access service, for the Ferrelview, Platte City, and Weston exchanges. The Commission also grants competitive classification for business services, other than exchange access service, in the Ferrelview, Platte City, St. Robert, and Waynesville exchanges. In addition, the Commission approves the tariff revisions filed to implement these classifications.

Procedural History

On August 30, 2005, Sprint filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. In its Application, Sprint requested that the Commission classify as competitive its residential services, other than exchange access service, in the Ferrelview, Platte City, and Weston exchanges. Sprint also requested competitive classification for its business services, other than exchange access service, in the Ferrelview, Platte City, St. Robert, Fort Leonard Wood, and Waynesville exchanges. Concurrent with the filing of its Application, Sprint filed proposed tariffs to become effective on September 29, 2005, reflecting the requested competitive classifications.

By notice issued September 2, 2005, the Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than September 7, 2005. The Commission also ordered the Staff of the Missouri Public Service Commission to file a recommendation and ordered that any objections to the application be filed no later than September 9, 2005. In addition, the Commission adopted a Protective Order.

On September 7, 2005, Fidelity Communication Services I, Inc., filed an Application to Intervene. The Commission granted Fidelity's intervention request on September 8, 2005. No other requests for intervention were filed.

On September 9, 2005, Sprint filed a Motion to Amend Application. In its motion, Sprint withdrew its request to include the Fort Leonard Wood exchange in its Application. Also on September 9, Fidelity filed a timely objection to the Application based on the inclusion of the Fort Leonard Wood exchange. Fidelity stated that it did not object if the motion to amend the Application was granted. The Commission granted Sprint's motion to amend its Application on September 13, 2005. No other objections to the Application were filed.

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Also filed on September 9, 2005, was Staff's recommendation. Staff recommended that Sprint's amended application be granted. Public Counsel filed a request for a formal public comment period, but did not file an objection to the Application.

On September 14, 2005, the parties filed a unanimous stipulation in which they stated that no party opposes Staff's recommendation and its attached schedules and no party opposes Sprint's amended application.

The Commission held a hearing on September 15, 2005. Staff, Sprint, and Public Counsel were represented at the hearing. The parties were given the opportunity to give closing arguments at the hearing in lieu of briefs. The Commission heard testimony from Sprint's witness, John Idoux, and from Staff's witness, John Van Eschen.

Discussion

On July 14, 2005, Senate Bill No. 237¹ (S.B. 237) was signed into law and became effective August 28, 2005. S.B. 237 changed the process under the price cap statute² for determining whether the business and residential services of a price cap regulated incumbent local exchange company (ILEC) should be classified as competitive in an exchange.

Before S.B. 237, the Commission was required to determine whether or not "effective competition" existed for the requested services in the designated exchanges. Under this "effective competition" standard, the Commission reviewed, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services. Under S.B. 237, however, the Commission no longer determines whether "effective competition" exists.

S.B. 237 focuses solely on the number of carriers providing "basic local telecommunications service" within an exchange. The Commission must classify the ILEC's services (business, residential, or both), as competitive in any exchange in which at least two other carriers are also providing basic local telecommunications services within an exchange.³

For the purpose of this case, one commercial mobile radio service (CMRS) provider is to be considered an entity providing "basic local telecommunications services."⁴ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.⁵

¹ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). (The relevant portions of the law will be codified at Section 392.245, RSMo 2005. All further references to the statute will be to the statute as amended by S.B. 237, unless otherwise noted.)

² Section 392.245, RSMo 2000.

³ Section 392.245.5, RSMo.

⁴ Section 392.245.5(1), RSMo.

⁵ Section 392.245.5(2), RSMo.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Sprint is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases are defined in Section 386.020. Sprint is a large incumbent local exchange carrier which became subject to price cap regulation under Section 392.245.

On August 30, 2005, Sprint filed its Application for Competitive Classification pursuant to Section 392.245.5. The Commission authorized the amendment of that application on September 13, 2005. In its amended application, Sprint requested that the Commission classify the business services in four exchanges, and the residential services in three exchanges, as competitive.

In support of this request, Sprint, filed its verified application including maps of the service territory of wireless carriers in the Sprint exchanges⁶ and the 2004 Annual Reports of Time Warner Cable Information Services (Missouri) LLC,⁷ Fidelity Communication Services I,⁸ and ExOp of Missouri, Inc.⁹ In addition, Sprint filed proposed tariff sheets.¹⁰

Sprint's regulatory affairs manager for Missouri and Kansas, John Idoux, also appeared and testified at the hearing in support of the amended application.

Staff also provided its verified recommendation in which it discussed its own investigation into the companies providing local voice service on a full facility or unbundled network element loop (UNE-L) basis. John Van Eschen, Utility Regulatory Manager of the Commission's Telecommunications Department, testified in support of the application at the hearing. According to Staff's recommendation, all of the exchanges for which Sprint requests competitive status "have at least one non-affiliated wireless provider and at least one non-affiliated entity providing local voice service on a full facility basis."¹¹

The parties unanimously stipulated that no party opposes Sprint's amended application or the Staff Recommendation and that the Commission should adopt Staff's recommendation. The parties further waived their rights to an evidentiary hearing in this matter. Therefore, the Commission finds that the facts as submitted in the verified amended application and the verified Staff Recommendation are reliable and support the grant of competitive classification in the requested exchanges.

⁶ Exhibit A.

⁷ Exhibit B.

⁸ Exhibit C.

⁹ Exhibit D.

¹⁰ Exhibit E.

¹¹ Staff Memorandum attached to Staff Recommendation (filed Sept. 9, 2005), p. 7.

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Based on the Stipulation, verified pleadings, and the testimony, the Commission finds the following:

- (A) ExOp and Time Warner are providing local voice service to residential and business customers on a full-facility basis in the Ferrelview exchange.
- (B) ExOp is providing local voice service to residential and business customers on a full-facility basis in the Platte City exchange. And, Time Warner is providing local voice service to business customers on a full-facility basis in the Platte City exchange.
- (C) Fidelity is providing local voice service to business customers on a full-facility basis in the St. Roberts exchange.
- (D) Fidelity is providing local voice service to business customers on a full-facility basis in the Waynesville exchange.
- (E) Time Warner is providing local voice service to residential customers on a full-facility basis in the Weston exchange.

In addition, based on the stipulation of the parties, the Commission finds that there is at least one non-affiliated CMRS carrier providing service to each customer class in each exchange for which Sprint seeks competitive classification.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5. This statutory provision requires the Commission:

within thirty days of the request, [to] determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

For the purpose of competitive status, one CMRS provider can be considered an entity providing "basic local telecommunications services."¹² The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.¹³

S.B. 237 defines "local voice service" as meaning "[r]egardless of the technology used . . . two way voice service capable of receiving calls from a provider of basic

¹² Section 392.245.5(1).

¹³ Section 392.245.5(2).

local telecommunications services as defined by subdivision (4) of section 386.020, RSMo.”¹⁴

The statute defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service.”¹⁵

The Commission concludes that the evidence as stipulated to by the parties satisfies the criteria in the statute. The evidence shows, for each of the four exchanges for business services and for each of the three exchanges for residential services, that there is at least one non-affiliated entity providing “local voice” service in whole or in part over facilities in which it or one of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3).

In addition, based on the stipulation of the parties, the Commission concludes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).

Therefore, the Commission concludes that Sprint’s request for competitive classification of certain exchanges shall be granted and its tariffs shall be approved.

IT IS THEREFORE ORDERED:

1. That the Stipulation filed by the parties is accepted.
2. That the business services, other than exchange access, in the Sprint Missouri, Inc., Ferrelview, Platte City, St. Roberts, and Waynesville exchanges shall be classified as competitive.
3. That the residential services, other than exchange access, in the Sprint Missouri, Inc., Ferrelview, Platte City, and Weston exchanges shall be classified as competitive.
4. That Sprint Missouri, Inc.’s proposed tariff revisions (Tracking No. YI-2006-0174) filed on August 30, 2005, as substituted on September 9, 2005, are approved to become effective for service on or after September 29, 2005. The tariff pages approved are:

P.S.C. MO.-No. 22 Section 51

First Revised Page 1, Cancels original Page 1

Original Page 1.1

First Revised Page 2, Cancels Original Page 2

Original Page 2.1

Original Page 2.2

First Revised Page 3, Cancels Original Page 3

Original Page 3.1

First Revised Page 4, Cancels Original Page 4

Original Page 4.1

First Revised Page 5, Cancels Original Page 5

Original Page 5.1

¹⁴ Section 392.245.5(3).

¹⁵ Section 386.020(52).

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First Revised Page 6, Cancels Original Page 6
Original Page 6.1
Original Page 6.2
First Revised Page 7, Cancels Original Page 7
Original Page 7.1
First Revised Page 8, Cancels Original Page 8
Original Page 8.1
First Revised Page 9, Cancels Original Page 9

5. That all other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.
6. That this Report and Order shall become effective September 29, 2005.
7. That this case may be closed on September 30, 2005.

Davis, Chm., Murray, and Appling, CC., concur;
Clayton, C., concurs, with separate opinion
to follow;
Gaw, C., dissents in part, with separate opinion
to follow;
and certify compliance with Section 536.080,
RSMo 2000.

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

This case is one of first impression for the Commission since the enactment of SB 237. This legislation, which became effective August 28, 2005, is the first major alteration of Missouri telecommunications law since the 1996 Telecom Act. As such the decisions in the first group of competitive classification cases will set the tone for the requisite quantity and quality of evidence necessary and legal standards employed to withdraw Public Service Commission (PSC) oversight of pricing by incumbent carriers.

In this case the parties entered into a Stipulation which adopted Staff's recommendations. It is not clear whether this Stipulation was intended to satisfy the requirements established in §392.245 RSMo. 2005 which would allow the Commission to dispense with the need for a specific finding of fact. This is important in this case because the evidence as submitted does not provide the basis for the necessary findings to grant competitive status.

Section 392.245.5 RSMo.2005 states that the named competitors must be "providing basic local telecommunications service to business customers within the exchange". (Emphasis added). Two things are evident from this language. First, the competitor must be "providing" the service to customers. In other words,

simply offering the service is not enough. Second, the service must be provided to “customers”. One customer is apparently not enough to satisfy the requirement.¹

The evidence submitted in this case is contrary to a finding that the Weston exchange is competitive. In that exchange there has been no evidence that a competitor is actually “providing” service. While the number of access lines does not necessarily reflect the number of customers, particularly with business accounts, the presence of zero access lines is clear evidence that no customers are being provided service.

The other significant question in this case involves wireless competition. I agree with the analysis done by Commissioner Clayton in his concurring opinion. Section 386.020(4) defines basic local telecommunications service as a “two-way” switched voice service within a local calling scope.” More importantly, this section clearly contemplates that this basic local telecommunications service should be provided without the incurrence of a toll charge. Section 392.234.5 provides that a wireless entity may be considered as a competitor so long as that wireless entity is “providing basic local telecommunications service within an exchange.” As such, if a wireline customer in the exchange is not able to complete a call to a customer of the wireless carrier with a billing address in that exchange without incurring a toll charge, then the wireless provider should not be considered to be providing basic local telecommunications service within the exchange. Since the parties stipulated that such service exists in the exchanges in question, no further analysis is required in this case. However, this is arguably an important element under the statute. Another question which arises under this new law is what it means for a wireless carrier to provide service to customers in an exchange. Is it sufficient to merely have tower coverage in some portion of the exchange? Probably not, since tower service alone would not give any indication that the wireless carrier provided their service to a customer having a residence or business within that exchange. Having the capability of providing service is as previously stated, not sufficient. With wireless systems the tower in the area could simply be for the use of customers passing through the area. A more reasonable interpretation would be that the carrier can demonstrate that they have customers with a billing address in the exchange. A wireless company that has not or will not sell to customers with an address in the exchange should not be allowed to be used as an alleged competitor to an incumbent local exchange company in that exchange and this interpretation is consistent with the language in the new statute.

¹ This statutory section similarly requires that competitors be providing service to residential “customers” prior to a finding that there is competition in the residential market. As such, evidence must exist that more than a single residential customer is being provided service by a competitor. Still later in the same statutory section, the requirement for more than a single customer is repeated. “Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential **customers**, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access service, as competitive within such exchange.”

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The bottom line in Sprint's case then is that the evidence of no access lines in the Weston exchange directly contradicts the parties' stipulation. Other evidence especially regarding wireless services in the case raises my suspicion as to whether the facts exist to meet the requirements of the statute. Because of this doubt and the problems in the Weston exchange I cannot support the Order.

The law passed by the General Assembly this year establishes an extremely low hurdle for the release of price oversight from the Public Service Commission allowing the carrier to have unlimited price increases. Formerly, this Commission examined a multiple of factors prior to granting competitive status to an ILEC. This examination was intended to ensure that sufficient competitive pressures existed to substitute for price oversight. In the 30-day review process provided by the new law only two carriers operating in the exchange with minimal customers takes away price increase protections. If the elements required by the new law are present the Company should clearly present them to the Commission.

**OPINION OF COMMISSIONER ROBERT M. CLAYTON III
CONCURRING, IN PART, AND DISSENTING, IN PART**

This Commissioner concurs with the majority's Report and Order granting competitive status in certain of the applicant's exchanges pursuant to the newly revised §392.245, RSMo 2005. However, this Commissioner has concerns with the implementation of this revised section, including the shortened time limits for review, several vague and unclear statutory references and the concern that certain customers in these exchanges will not be protected from the occasionally unkind "invisible hand of competition." Real competition and real alternative options for consumers must be present within an exchange before incumbent providers are released from pricing regulation. Premature competitive classification could lead to unrestrained prices and unnecessarily higher costs to consumers.

While the parties have argued that the General Assembly has set a very low bar for the incumbent provider to clear in achieving competitive status, this Commission has an obligation to compile a complete record with competent and substantial evidence in determining whether that burden has been met. This Commissioner supports the Report and Order and its conclusions but laments on the future impact on the customers of certain exchanges.

First of all, this Commission has been left with very little time to make a thorough review of this application. According to the enabling statute, §392.245, RSMo. 2005,¹ within thirty days of the initial filing, the Commission is required to make a determination on the applicant's request. Due process in any contested case requires that a procedural schedule be set, that pleadings and reports from the parties be reviewed, that evidentiary and discovery matters be decided, a hearing conducted complete with an opportunity to ask questions, a thorough record be established and that a Report and Order be issued. While this Commissioner appreciates the need for setting time lines and encouraging prompt rulings, this time period is simply inadequate to ensure that enough material has been reviewed and evaluated to support a Report and Order. Considering that Commis-

¹ All statutory references are Revised Missouri Statutes 2005.

sion Orders have effective dates subsequent to the date of issue, it is unclear whether the review time has been reduced to 20 days, using a normal 10-day effective date. In addition, scheduling dates for evidentiary hearings has been a tedious and difficult endeavor because the four large incumbents filed their five cases near in time requesting prompt attention.

Secondly, this Commissioner is concerned with the definitions presented by the parties and their interpretation of the legislature's intent. It is this Commissioner's opinion that the General Assembly intended to open up only those exchanges in which competition was present and multiple providers are available for hire by customers. Regulation stands in the place of competition only when there is an absence of competition in the marketplace or when one provider may act without discipline from competitive pressures. When consumers have a choice of services and providers, less market regulation is necessary.

Prior to the release of full-fledged pricing "flexibility" for Missouri's incumbent providers, the General Assembly demanded the presence of two different, non-affiliated competitive providers-for both business and residential customers-and that those companies be "providing basic local telecommunications service to ... customers within the exchange" §392.245.5. A description of this competition in the marketplace also includes a requirement that the competitor provide "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest ..." §392.245.5(2).

The General Assembly offered additional direction by indicating the form of choice and the type of provider or service. The statute requires the presence of not merely one, but two different providers who must not have an affiliation with the incumbent. In addition, the statute specifically excludes certain types of Voice-over Internet Protocol (VoIP) service, especially if that service is dependent on an unaffiliated, third-party broadband internet service provider. §392.245.5.

In contrast, the statute also references Commercial Mobile Radio Service (CMRS) and specifically includes this medium as one type of technology or service, which may count as one, and only one, of the two non-affiliated competitors.

(1) Commercial mobile service providers as identified in 47 U.S.C. Section 332(d)(1) and 47 C.F.R. Parts 22 or 24 shall be considered as entities providing basic local telecommunications service, provided that only one such non-affiliated provider shall be considered as providing basic local telecommunications service within an exchange; Section 392.245.5.

In each of the subject exchanges in this case, the applicant has used this section in compiling the list of competition by referencing at least one wireless provider. Staff, in submitting its report and recommendation, indicated its concurrence, eventually stipulating to not opposing the application and the alleged existence of at least one wireless carrier in each exchange. However, it appears from the record that staff only did a partial review of the wireless service in each of the exchanges by scanning the exhibits filed by the applicant, which included copies of coverage maps from websites. Such evidence that the cities of Ferrelview, Platte City, Weston, St. Robert or Waynesville fall within the shaded sections of the coverage maps amounts to unsubstantiated hearsay.

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The record is devoid of any reference to whether the competing wireless carrier holds itself out to customers in those exchanges or whether it offers a local phone number to those exchanges or whether a customer from any of these communities may name an address in that community for billing services. It is unclear whether there are any cell phone stores offering some type of service in these exchanges. Moreover, it is unclear from the record whether any of the proposed wireless providers have any business or residential customers. The record should contain this information so that the Commission is aware of the extent of the competition.

The new statute does provide some guidance on the type of service necessary for a finding of competitive status. Initially, in §392.245.5, carriers that may be considered when evaluating an exchange must be “providing basic local telecommunications service to . . . customers within the exchange.” In addition, §392.245.5(3) provides, “Regardless of the technology utilized, local voice service shall mean **two-way voice service capable of receiving calls from a provider of basic local telecommunications services** as defined by subdivision (4) of §386.020, RSMo;”(emphasis added). That section defines “basic local telecommunications service” as “two-way switched voice service **within a local calling scope** as determined by the commission comprised of any of the following services . . .”(emphasis added) §386.020(4).² This definition recognizes boundaries of a “two-way” service within a “local calling scope.” Lastly, the new statutory language of §392.245, does not include a reference to the term “interexchange telecommunications service,” which is defined as “service between points in **two or more exchanges;**” (emphasis added) §386.020(24), RSMo. 2005, which is known as long distance or toll calling service.

² It should be noted that §386.020(4) continues in the definition of “Basic Local Telecommunications Service” as two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges:

- (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
- (b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;
- (c) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (d) Access to basic local operator services;
- (e) Access to basic local directory assistance;
- (f) Standard intercept service;
- (g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations;

Reading these provisions in concert, the customer of the local voice service provider must be capable of receiving calls from a provider of "basic local telecommunications services," defined in §386.020(4). If there is no local phone number for a wireless company in an exchange, the wireless customer cannot receive calls from the "basic local telecommunications services" carrier without the call being routed through an "interexchange telecommunications services" provider. The wireless customer would then be receiving the call from the "interexchange" carrier, which is not referenced in the new statute. Therefore, the wireless carrier should not be considered as a provider to enable competitive status.

If there is no local cell number available and a cell phone customer can only be reached by a local wireline customer by making a long distance toll call within the exchange, does it make sense that the customer will be experiencing competition for his local telephone service? Does it make sense that a business customer will subject his customers to calling long distance to an out-of-town cell phone if a local landline is available? Is this real, direct marketplace competition?

At the very least, this issue should have been fully reviewed and considered. While the record may lack sufficient evidence of local cell phone service in an exchange, the record does not indicate the converse or that providers are not serving the areas. This Commission has not been provided information about the exact nature of the cell phone service and is forced to decide the case without such material. This Commissioner believes that the General Assembly fully expected the Commission to complete this analysis and that any decision reached would be made on competent and substantial evidence presented by the parties. In a scenario where a customer procures a cell phone from a different community, possibly miles away because a local number is not available, and if the customer's neighbors, friends, family and business clients, have to pay long distance charges because the call is not considered a local call, it is this Commissioner's belief that the legislature did not intend for that provider to be considered as a competitor of "basic local telecommunications service."

In conclusion, this Commissioner is concerned about the overall lack of competent, direct, first-hand knowledge-based evidence. While this Commissioner recognizes that there are challenges to gathering information and putting that information in evidentiary form, and that this case is the first of its type to be prosecuted, this case is based almost entirely on second- or third-hand evidence. Information has been retrieved from webpages and advertisements and data taken from reports filed by third parties at the Commission. While some have argued that business and official records can be included in the record, subject to authentication and adequate foundation, but much of that evidence is outdated. The Commission's Annual Reports used by staff use 2004 data. Much has occurred in telecommunications in recent years casting doubt on the relevance of such documents including the recently issued *USTA II* and *BrandX* Supreme Court decisions, the FCC's *Triennial Review Remand Order*, Universal Service Fund and ETC Reform, three major mergers of large nationwide carriers, new FCC Orders relating to billing, intercarrier compensation and enhanced records exchange rules, not to mention the proposed Telecom Act of 2006 and additional proposals

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at both the state and federal level. In reviewing this application, the Commission should demand that it have solid evidence before it of the competitive presence in an exchange before unleashing the unbridled hand of competitive forces on customers in these exchanges.

This Commissioner supported the majority's Report and Order because of the Stipulation of no opposition, the apparent lack of any contested issue and because, frankly, it is the first of the competitive classification cases moved through the system in 30 days. If this Commissioner had additional time, more scrutiny would have been applied to the nature and existence of wireless providers in the subject exchanges. It is critical that the Commission complete this analysis prior to the reduction of regulatory protections for consumers.

For the foregoing reasons, this Commissioner respectfully submits this concurrence.

**In the Matter of the Request of Southwestern Bell Telephone,
L.P., d/b/a SBC Missouri, for Competitive Classification
Pursuant to Section 392.245.6, RSMo (2005) – 30-day Peti-
tion.**

*Case No. TO-2006-0093
Decided September 26, 2005*

Telecommunications §40. The Commission grants SBC Missouri competitive classification for business services for 45 of the 61 exchanges requested. The Commission also grants SBC Missouri competitive classification for residential services for 26 of the 29 exchanges requested. The Commission transfers, to Case No. TO-2006-0102, the consideration of SBC Missouri's request for competitive classification for business services in 16 exchanges and the residential services in three exchanges.

Appearances

Leo J. Bub, Attorney at Law, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, One SBC Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Vicky Ruth, Senior Regulatory Law Judge.**

CORRECTED REPORT AND ORDER

Syllabus: In this Report and Order, the Commission grants in part and denies in part the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification, pursuant to Section 392.245.5, for business and residential services, other than exchange access service, in certain exchanges. More specifically, the Commission grants SBC Missouri competitive classification for business services for 45 of the 61 exchanges requested.¹ The Commission also grants SBC Missouri competitive classification for residential services for 26 of the 29 exchanges requested.² In addition, the Commission rejects the company's proposed tariffs, but authorizes it to file tariffs in compliance with this order. Finally, the Commission transfers, to Case No. TO-2006-0102, the consideration of SBC Missouri's request for competitive classification for business services in 16 exchanges³ and for residential services in three exchanges.⁴

¹ See ordered paragraph 3.

² See ordered paragraph 4.

³ See ordered paragraph 5.

⁴ See ordered paragraph 6.

Procedural History and Pending Motion

On August 30, 2005, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, filed its Petition for Competitive Classification pursuant to Section 392.245.5, RSMo (2005). In its Petition, SBC Missouri requested that the Commission, within 30 days, classify the business services in 51 specified exchanges, and the residential services in 28 specified exchanges, as competitive. SBC Missouri also requested that within 60 days, the Commission classify the business services in 26 specified exchanges, and the residential services in 49 specified exchanges, as competitive. In addition, SBC Missouri requested that the Commission grant it competitive classification for any exchanges where the Commission's investigation identified that competitive classification should be granted. During the course of the proceeding, SBC Missouri withdrew some exchanges and added others to its request for competitive classification. Consequently, SBC Missouri now requests that the Commission grant it competitive classification for business services in 61 exchanges and in 29 exchanges for residential services.⁵

Subsection 392.245.5, RSMo, provides for an expedited two-track procedure when a price-cap regulated incumbent local exchange company seeks competitive classification for its services within one or more exchanges. The two procedures are designed as a 30-day track and a 60-day track. By notice issued September 2, 2005, the Commission informed the parties that this case, TO-2006-0093, would address the portions of the petition regarding the 30-day track. By a separate order issued the same day, the Commission opened a new case, TO-2006-0102, to address the portions of the petition regarding the 60-day track.

On September 2, 2005, the Commission ordered that notice of SBC Missouri's application be sent to all certificated competitive local exchange carriers and to all incumbent local exchange carriers in the State of Missouri. At the same time, the Commission set an intervention deadline; ordered the Commission's Staff to file its recommendation; set a deadline for any other party to file objections regarding the petition, set a procedural schedule; and adopted a Protective Order. No party filed an application to intervene.

On September 6, 2005, Public Counsel filed a motion to declassify certain exhibits from SBC Missouri's Petition that were designated as Highly Confidential and requested that its motion be handled on an expedited basis. On September 12, 2005, SBC Missouri filed its Response to Public Counsel's Motion. The Commission, on September 13, 2005, issued its Order granting Public Counsel's request and declassifying Exhibits A-1(HC) and A-2(HC) from SBC Missouri's Petition.

Also on September 6, 2005, Public Counsel filed a Request for Public Hearing, which the Commission later denied.

On September 12, 2005, Staff filed its recommendation, along with the Direct Testimony of John Van Eschen. Public Counsel filed comments on SBC Missouri's application on September 12, 2005. SBC Missouri filed the Direct Testimony of Craig A. Unruh on September 13, 2005. SBC Missouri and Staff filed Pretrial Briefs and Proposed Findings of Fact and Conclusions of Law on September 14, 2005. On September 16, 2005, the Commission conducted an evidentiary hearing. SBC

⁵ Exhs. 2 and 3 (Exchange Charts).

Missouri, Staff, and Public Counsel were represented by counsel at the hearing. The Commission heard testimony from SBC Missouri's witness, Craig Unruh, and Staff's witnesses, John Van Eschen and Natelle Dietrich.

On September 19, 2005, the Commission issued an order directing its Staff and certain non-parties to expeditiously file additional information. Sprint Communications Company, L.P., NuVox Communications of Missouri, Inc., Big River Telephone Company, LLC, and Staff each filed responses on September 20, 2005. SBC Missouri filed its reply on September 21, 2005.

On September 23, 2005, Staff filed a Motion to Waive Rule and Petition to Reopen the Record and Supplemental Direct of John Van Eschen. On the same date, the Commission issued an order directing that responses be filed no later than 10:00 a.m. on September 26, 2005. SBC Missouri timely filed its response, indicating that it has no objection to the Commission granting Staff's Motion. The Commission has reviewed Staff's request, along with SBC Missouri's response, and finds that good cause exists to waive rule 4 CSR 240-2.110(8). The Commission will therefore allow the record to be reopened for the purpose of accepting the Supplemental Direct Testimony of John Van Eschen, which will be designated as Exhibit 9.

Discussion

On July 14, 2005, Senate Bill No. 237⁶ was signed into law and became effective on August 28, 2005. Senate Bill No. 237 (S.B. 237) changes the process under the price cap statute⁷ for determining whether the business and residential services of a price cap regulated incumbent local exchange company (ILEC) should be classified as competitive in an exchange. Before S.B. 237, the Commission was required to determine whether or not "effective competition" existed for the requested services in the designated exchanges. Under this "effective competition" standard, the Commission considered, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

Under S.B. 237, the focus is solely on the number of carriers providing "basic local telecommunications service" within an exchange. The Commission must classify as competitive the ILEC's services (business, residential, or both) as competitive in any exchange in which at least two other carriers are also providing "basic local telecommunications service" within an exchange.⁸

For the purpose of the 30-day investigation, one commercial mobile radio service ("CMRS" or "wireless") provider is to be considered an entity providing "basic local telecommunications services"⁹ in an exchange. The statute also requires the Commission to consider as a "basic local telecommunications

⁶ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo 2005). (The portions of the law relevant to this case will be codified at Section 392.245.5, RSMo 2005.)

⁷ Section 392.245, RSMo 2000.

⁸ Section 392.245.5, RSMo (2005).

⁹ Section 392.245.5(1), RSMo (2005) (however, only one such non-affiliated provider will be counted as providing basic local telecommunications service within an exchange).

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service provider” any entity providing “local voice”¹⁰ service “in whole or in part” over facilities in which it or one of its affiliates has an ownership interest.¹¹

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Southwestern Bell Telephone, L.P., is a Texas limited partnership, with its principal Missouri office at One SBC Center, Room 3520, St. Louis, Missouri 63101.¹² Southwestern Bell Telephone, L.P., is authorized to do business in Missouri, and its fictitious name “SBC Missouri” is duly registered with the Missouri Secretary of State.¹³ SBC Missouri is a “local exchange telecommunications company” and a “public utility,” and is duly authorized to provide “telecommunications service” within the state of Missouri as each of those phrases are defined in Section 386.020, RSMo 2000.¹⁴

SBC Missouri is a large incumbent local exchange carrier which became subject to price-cap regulation under Section 392.245 on September 26, 1997.¹⁵

On August 30, 2005, SBC Missouri filed its Petition for Competitive Classification pursuant to Section 392.245.5, RSMo. In its Petition, SBC Missouri requested that the Commission, within 30 days, classify as competitive the business services in 51 specified SBC Missouri exchanges, and the residential services in 28 specified SBC Missouri exchanges. SBC Missouri also requested that if, during the 30-day investigation, the Commission rejects the company’s request for competitive classification for business or residential service in any of the SBC Missouri exchanges in which such competitive classification is requested, that the Commission include those services and exchanges in its 60-day investigation and grant competitive classification in that proceeding. In addition, SBC Missouri requested that the Commission grant it competitive classification for business or residential services in any additional exchanges that Staff determines meet the statutory criteria for competitive classification.

¹⁰ Section 392.245.5(3), RSMo (2005) defines “local voice service” as meaning “[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo.”

¹¹ Section 392.245.5(2) RSMo (2005).

¹² SBC Missouri’s Petition, para. 10.

¹³ SBC Missouri’s Petition, para. 10, and see Case No. IN-2003-0247.

¹⁴ SBC Missouri’s Petition, para. 10.

¹⁵ SBC Missouri’s Petition, para. 11, and see Case No. TO-97-397

In support of its request, SBC Missouri filed its verified application on August 30, 2005, including maps identifying the exchanges in which the company requests competitive classification.

SBC Missouri's Executive Director-Regulatory, Craig A. Unruh, filed Direct Testimony on September 13, 2005, further supporting SBC Missouri's Request for Competitive Classification. Mr. Unruh also provided supplemental information by means of affidavits filed on September 21, 2005.

Staff filed its recommendation on September 12, 2005, along with the Direct Testimony of John Van Eschen, the Manager of the Telecommunications Department. For many of the exchanges identified in SBC Missouri's Petition, Staff provided additional verification that the statutory criteria has been met for granting competitive classification for business or residential service (or both) in the requested exchanges. Staff's evidence primarily consists of a review of confidential CLEC annual reports filed with the Commission and telephone calls to some CLECs to discuss their reports.

Public Counsel did not file any testimony, nor did it provide any witnesses at the hearing. Public Counsel asserts that SBC Missouri should be held to "strict proof" in its claim for competitive classification.¹⁶ Although Public Counsel acknowledges that the price cap revisions for the 30-day competitive petition do not require a determination of the number of customers or of the market strength of the competitors cited by SBC Missouri, Public Counsel suggests that the Commission nonetheless require disclosure of the number of customers served by the qualifying competitors so that the public and the Commission understand the extent to which competition exists under the 30-day petition.

I. Business Services

Pursuant to Section 392.245.5, SBC Missouri requests competitive classification for business services in the following 61 exchanges:

Antonia, Archie, Ash Grove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chaffee, Chesterfield, Clever, Eldon, Eureka, Excelsior Springs, Farley, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculanum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Linn, Manchester, Marble Hill, Marshall, Maxville, Mexico, Moberly, Monett, Montgomery City, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Clair, St. Genevieve, St. Joseph, St. Louis, Union, Valley Park, and Washington.

¹⁶ Office of the Public Counsel's Objections and Recommendations, filed September 12, 2005.

A. The “Additional” Exchanges

The Commission notes that SBC Missouri’s petition did not request competitive classification for six of these 61 exchanges under the 30-day or the 60-day track. These six exchanges are Chaffee, Linn, Moberly, Montgomery City, St. Clair, and Union. The following nine exchanges were listed in the 60-day request but not in the 30-day request: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Farley, Marshall, and Mexico. SBC Missouri added these 15 exchanges to its request after John Van Eschen, of the Commission’s Staff, filed his testimony on September 12, 2005. In that testimony, Mr. Van Eschen indicates that it appears that these 15 exchanges qualify for competitive status under the 30-day track. Staff, however, recommends that the Commission not grant competitive classification under the 30-day track in these 15 exchanges because Staff believes that before competitive status is granted, an incumbent local exchange company “should be required to identify the specific exchanges . . . and provide some sort of supporting evidence.”¹⁷

SBC Missouri did not request, by exchange name, that it be granted competitive classification under the 30-day track in these 15 exchanges until it filed its pretrial brief on September 13, 2005. Thus, interested parties could not have learned that SBC Missouri might request and receive competitive classification in this case in the 15 exchanges until nearly one-half way through the 30-day process. As will be discussed in the conclusions of law section of this order, the Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition so that interested parties have a meaningful opportunity to intervene and respond to the application. Therefore, the Commission will not consider SBC Missouri’s request for competitive classification for business services for the 15 exchanges that are not listed in the 30-day portion of SBC Missouri’s Petition. The Commission will, however, transfer these exchanges to Case No. TO-2006-0102, where they will be evaluated pursuant to the 60-day track of Section 392.245.5. If SBC Missouri prefers, it may expeditiously file a notice indicating that it prefers to file a new petition for these 15 exchanges pursuant to the 30-day procedure in Section 392.245.5.

B. The Exchanges Agreed Upon by SBC Missouri & Staff

SBC Missouri and Staff agree that SBC Missouri should be granted competitive classification for business services in 43 of the 61 requested exchanges.¹⁸ These 43 exchanges are as follows:

Antonia, Camdenton, Cape Girardeau, Chesterfield, Clever, Eldon, Eureka, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculaneum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-

¹⁷ Exhibit 6, Amended Direct Testimony of John Van Eschen, p. 13.

¹⁸ Exh. 3 (Exchange Chart); Exh. 6, Amended Direct Testimony of John Van Eschen; and Exh. 9, Supplemental Direct Testimony of John Van Eschen.

Osage Beach, Manchester, Maxville, Monett, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, and Washington.

In these 43 exchanges, SBC Missouri and Staff provided evidence that:

- There is at least one non-affiliated CLEC providing “local voice” service in whole or in part over facilities in which it or on of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3); and
- There is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).¹⁹

SBC Missouri indicates that, for the first competitor (the CLEC) listed on its charts,²⁰ the sources of its data include E-911 records, (internal records) of migrations from UNE-P to CLEC facilities, Annual Reports (public versions) filed with the Commission, and directory listings.²¹ SBC Missouri also indicates that for the wireless competitors, the source of its data was the web site “LetsTalk.com.”²² Staff’s data is primarily based upon the Commission’s Annual Reports, including those that are designated as Highly Confidential, and Staff’s telephone calls to some CLECs to discuss these reports.²³

No party presented any evidence refuting the claims of SBC Missouri and Staff that these 43 exchanges have the requisite number of carriers providing basic local telecommunications services for business services.

Based upon the evidence presented by SBC Missouri and Staff, the Commission finds that in each of these 43 exchanges, there is (1) at least one non-affiliated CLEC providing local voice service to business customers, and (2) at least one non-affiliated wireless carrier providing service to business customers.

C. Exchanges In Dispute By SBC Missouri and Staff

As noted above, SBC Missouri now requests that the Commission grant it competitive classification for business services in 61 exchanges. The Commission has addressed 58 of those exchanges – the 15 exchanges that were not specifically identified in SBC Missouri’s original 30-day request plus the 43 exchanges that Staff and SBC agree should be granted competitive classification. The three exchanges remaining are Bonne Terre, Excelsior Springs, and Marble Hill.

¹⁹ Petition and its Exhs. A-1 and A-2; Exh. 1, Direct Testimony of Craig Unruh; Exh. 3 (Exchange Chart); and Exhibit 6, Amended Direct Testimony of John Van Eschen.

²⁰ Exh. 3 (Exchange Chart).

²¹ Exh. 1, Direct Testimony of Craig Unruh; and Exh. 3 (Exchange Chart).

²² Id.

²³ Exh. 6, Amended Direct Testimony of John Van Eschen.

1. Bonne Terre

SBC Missouri alleges that it should be granted competitive classification for business services in the exchange of Bonne Terre. SBC Missouri identifies Sprint/Nextel as the non-affiliated wireless, or CMRS, company providing local voice service to business customers.²⁴ According to SBC Missouri, the source of its data for the wireless competitor is the web site "LetsTalk.com." Staff agrees that the wireless company, Sprint/Nextel, is a wireless company providing local voice service to business customers in the exchange.

SBC Missouri identifies Big River Telecommunications as a competitor providing local voice service to business customers in the exchange of Bonne Terre.²⁵ SBC Missouri indicates that its position is based upon its own records of migrations from UNE-P to CLEC facilities.²⁶ Staff, however, contends that Big River should not count as a competitor because the company is not providing business local voice service on a full facility basis or UNE-L basis in this exchange.²⁷ Staff claims that according to a Big River Telecommunications official, Big River Telecommunications is providing business local voice service in these exchanges on a UNE-P basis.²⁸

Pursuant to a Commission order, Big River Telecommunications filed a verified pleading on September 20, 2005, indicating that it is providing basic local telecommunications services in the Bonne Terre exchange. Big River Telecommunications' filing does not indicate whether the company is providing service to business or residential customers, or both.

SBC Missouri has proposed, in certain exchanges such as Bonne Terre, to base its claim for competitive status on the existence of competitors who provide service through an unbundled network element platform (UNE-P). Service provided to customers through UNE-P is identical to the service provided through resale. In *USTA v. FCC*, 25 S. Ct 313 (2004), the Supreme Court determined that the Federal Communications Commission's (FCC's) analysis that the impairment to competitors necessary to a finding that a network element must be unbundled had reached too far. The FCC had previously required the incumbent carriers to unbundle the entirety of their networks, because without access to the network at element pricing, competitors were economically impaired from market entry.

In finding economic impairment to be overbroad, the Court noted:

. . . The touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers "make entry into a market uneconomic." Uneconomic by whom? . . . By a hypothetical CLEC that used "the most efficient telecommunications technology currently available," the standard that is built into TELRIC? . . .

²⁴ Exh. 3 (Exchange Chart).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15, lines 12-15.

²⁸ Exh. 9, Supplemental Direct Testimony of John Van Eschen.

* * *

. . . In the name of “universal service,” state regulators have commonly employed cross-subsidies, tilting rate ceilings so that revenues from business and urban customers subsidize residential and rural ones. On remand from our decision in *USTA I*, the Commission decided to consider regulated below-cost retail rates as a factor that may “impair” CLECs in competing for mass market customers. . . .

The Commission’s brief treatment of the issue makes no attempt to connect this “barrier” to entry either with structural features that would make competitive supply wasteful or with any other purposes of the Act (other than, implicitly, the purpose of generating “competition,” no matter how synthetic). . . . [W]here TELRIC rates are so low that unbundling does elicit competitive entry, . . . artificially low rates [are] funded by [cross-subsidies from] other areas.

. . . [H]istoric accounting costs . . . may not track true accounting cost. But that is no justification for the Commission’s refusal . . . to adopt . . . a policy that . . . advances the goals of the Act. [Italics and cites omitted.]

In response to the *USTA II* decision discussed above, the FCC issued its Triennial Review Remand Order (TRRO), in which it significantly limited the economic impairment test and established a phase-out of UNE-P. In doing so, it noted:

This Order imposes unbundling obligations in a more targeted manner where requesting carriers have undertaken their own facilities-based investments and will be using UNEs in conjunction with self-provisioned facilities. TRRO, FCC 04-240, at ¶ 3.

This Commission finds that the FCC’s new approach in the TRRO is harmonious with Section 392.245.5(2), which requires a competitor to be providing service “in whole or in part” over its own facilities. Therefore, this Commission will not rely on the presence of any UNE-P competitor not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO and recent decisions of this Commission, to meet the requirements of Section 392.245.5(2).

As SBC Missouri provided evidence that Big River Telecommunications is migrating from UNE-P to CLEC facilities, the Commission finds that Big River Telecommunications does qualify under Section 392.245.5, RSMo, as a competitor providing local voice service. Thus, SBC Missouri has provided competent and substantial evidence that for business services, in the Bonne Terre exchange there is at least one non-affiliated CLEC providing local voice service to business customers, and at least one non-affiliated wireless carrier providing service to business customers.

2. Excelsior Springs

SBC Missouri requests competitive classification for business services in the Excelsior Springs exchange. The company claims that one competitor is NuVox Communications of Missouri, Inc.; the source of SBC Missouri's data is E-911 listings.²⁹ SBC Missouri contends that its second competitor is the wireless company Verizon, which it based on information it gathered from the web site "LetsTalk.com."³⁰

Staff concurs with SBC Missouri that Verizon is providing local voice service in this exchange. Staff, however, objects to SBC Missouri's use of NuVox as one of its competitors. Staff states that it has been unable to confirm that a qualifying competitor is providing business local voice service on a full facility basis or UNE-L basis in the Excelsior Springs exchange.³¹ Moreover, NuVox has informed Staff that NuVox does not believe that it has any customers in the Excelsior Springs exchange.³²

In addition, the supplemental Direct Testimony of Staff's witness John Van Eschen indicates that:

There appears to be a discrepancy as to whether the NuVox customer has a physical location in the Excelsior Springs exchange. SBC officials claim the customer has a premise in Excelsior Springs based on the directory listing data base which shows the Excelsior Springs telephone numbers in question are associated with a location in the Excelsior Springs exchange. In contrast, the E-911 data base shows the five telephone numbers are associated with a location in the Kansas City exchange. According to NuVox officials, NuVox is providing foreign exchange service to a customer with a location in the Kansas City exchange but the customer has been given five Excelsior Springs telephone numbers. Staff has been unable to resolve the discrepancy; however, it is probably reasonable to expect greater care is used to ensure location accuracy in the 911 data base.

Mr. Van Eschen also indicates that, in Staff's opinion, "foreign exchange service or a service where the customer is physically not residing in the exchange raises questions as to the appropriateness of granting competitive status in the exchange."³³ According to Staff, "such arrangements are not typically associated with competition within the designated exchange where dial tone is being provided, in this case Excelsior Springs."³⁴ Staff recommends that the Commission not grant

²⁹ Exh. 3 (Exchange Chart).

³⁰ Id.

³¹ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15, lines 16-23.

³² Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15, lines 20-23.

³³ Exh. 9, Supplemental Direct Testimony of John Van Eschen, page 8.

³⁴ Exh. 9, Supplemental Direct Testimony of John Van Eschen.

competitive classification of business services for the Excelsior Springs exchange.³⁵

The Commission finds that the evidence shows that Verizon, a wireless competitor, is providing local voice service in the Excelsior Springs exchange. However, SBC Missouri's second competitor, NuVox, does not withstand scrutiny. The Commission finds that Staff has shown that there is a discrepancy as to whether the NuVox customer has a physical location in Excelsior Springs. Consequently, there are significant questions as to whether NuVox is providing local voice service since the customer is not physically residing in the Excelsior Springs exchange. The Commission finds that SBC Missouri has not provided substantial and competent evidence that NuVox qualifies as a provider of local voice service for business services in this exchange.

3. Marble Hill

SBC Missouri states that, for the Marble Hill exchange, the wireless company Verizon qualifies as a competitor based on the web site "LetsTalk.com."³⁶ Staff agrees that the wireless company, Verizon, is providing local voice service in the Marble Hill exchange. The Commission finds that the parties have provided competent and substantial evidence that Verizon is providing local voice service in the Marble Hill exchange.

SBC Missouri names Big River Telecommunications as the other competitor in the Marble Hill exchange, based upon SBC Missouri's records of migrations from UNE-P to CLEC facilities.³⁷ Staff argues that the Commission should not count Big River Telecommunications as a competitor in the Marble Hills exchange because Big River was unable to confirm that it was utilizing its own switching facilities to service customers.³⁸

Big River Telecommunications filed a verified pleading on September 20, 2005, indicating that it does provide basic local telecommunications services in Marble Hill. The pleading does not, however, indicate whether the company uses UNE-P, UNE-L, or full facilities to provide such service. In addition, the pleading does not indicate whether Big River Telecommunication has business customers, residential customers, or both in this exchange.

As discussed in the section on the Bonne Terre exchange (business services), the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to UNE-L (or facilities-based) in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). SBC Missouri, however, has provided evidence that Big River Telecommunications is migrating from UNE-P to a partial or full facilities-based system. Therefore, the Commission finds that SBC Missouri has shown that there are two qualifying competitors in this exchange.

³⁵ Exh. 9, Supplemental Direct Testimony of John Van Eschen, page 8.

³⁶ Exh. 3 (Exchange Chart).

³⁷ Exh. 3 (Exchange Chart).

³⁸ Transcript, p. 134-135.

II. Residential Services

SBC Missouri requests competitive classification for residential services in the following 29 exchanges:

Advance, Bell City, Chesterfield, Delta, Eureka, Farmington, Fenton, Fredericktown, Harvester, Joplin, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pocohontas-New Wells, Pond, San Antonio, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

A. The “Additional” Exchange

Although SBC Missouri named the Joplin exchange in its 60-day request, the company did not name the Joplin exchange in its 30-day request (for residential services).³⁹ SBC Missouri added this exchange to its request once John Van Eschen, of the Commission’s Staff, filed his testimony on September 12, 2005. In that testimony, Mr. Van Eschen indicates that it appears that the Joplin exchange qualifies for competitive status under the 30-day track for residential services. Nonetheless, Staff recommends that the Commission not grant competitive classification for residential services in the Joplin exchange because Staff believes that an ILEC “should be required to identify the specific exchanges . . . and provide some sort of supporting evidence” before competitive classification is granted.⁴⁰

The Commission finds that would be inappropriate to grant competitive classification in an exchange that was not named in the petition. The Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition so that interested parties have a meaningful opportunity to intervene and respond to the application. Accordingly, the request for competitive classification of residential services in the Joplin exchange will not be considered in this case, but it will be addressed in Case No. TO-2006-0102, the 60-day case, unless SBC Missouri files a notice, as discussed previously, indicating that it opposes such transfer.

B. Exchanges Agreed Upon by SBC Missouri & Staff

In 25 of the 29 exchanges in which SBC Missouri requests competitive classification for residential services, the company and Staff agree that SBC should be granted competitive classification. These 25 exchanges are as follows:

Advance, Bell City, Chesterfield, Delta, Eureka, Fenton, Fredericktown, Harvester, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pocohontas-New Wells, Pond, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

³⁹ Petition, Exhs. A-4 and B-4; Exhibit 5, Direct Testimony of John Van Eschen, p. 13. See also, Exhibit 6, Amended Direct Testimony of John Van Eschen, p. 13.

⁴⁰ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 13.

In these 25 exchanges, SBC Missouri and Staff provided evidence that:

- There is at least one non-affiliated CLEC providing “local voice” service in whole or in part over facilities in which it or on of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3); and
- There is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).⁴¹

SBC Missouri indicates that, for the first competitor listed on its charts⁴², the sources of its data include E-911 records, (internal records) of migrations from UNE-P to CLEC facilities, Annual Reports (public versions) filed with the Commission, and directory listings.⁴³ SBC Missouri also indicates that, for the wireless competitors, the source of its data was the web site “LetsTalk.com.”⁴⁴ Staff’s data is primarily based upon the Commission’s Annual Reports, including those that are designated as Highly Confidential, and Staff’s telephone calls to some CLECs to discuss these reports.⁴⁵

No party presented any evidence refuting the claims of SBC Missouri and Staff that these 25 exchanges have the requisite number of carriers providing basic local telecommunications services.

Based upon the evidence presented by SBC Missouri and Staff, the Commission finds that in each of these 25 exchanges, there is: (1) at least one non-affiliated CLEC providing local voice service to residential customers, and (2) at least one non-affiliated wireless carrier providing service to residential customers.

C. Exchanges In Dispute By SBC Missouri and Staff

As noted above, SBC Missouri now requests that the Commission grant it competitive classification for residential services in 29 exchanges. The Commission has addressed 26 of those exchanges. Those 26 exchanges consist of the 25 exchanges that Staff and SBC agreed upon plus the one exchange that was not specifically identified in SBC Missouri’s original 30-day request. The remaining three exchanges are Farmington, San Antonio, and Sikeston.

1. Farmington

SBC Missouri alleges that it should be granted competitive classification for residential services in the Farmington exchange, where it identifies Sprint/Nextel as the wireless company qualifying as its second competitor.⁴⁶ The source of SBC

⁴¹ Petition and its Exhs. A-1 and A-2; Exh. 1, Direct Testimony of Craig Unruh; Exh. 3; and Exhibit 6, Amended Direct Testimony of John Van Eschen.

⁴² Exh. 3 (Exchange Chart).

⁴³ Exh. 1, Direct Testimony of Craig Unruh; and Exh. 3 (Exchange Chart).

⁴⁴ Id.

⁴⁵ Exh. 6, Amended Direct Testimony of John Van Eschen.

⁴⁶ Exh. 3 (Exchange Chart).

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Missouri's evidence is the web site LetsTalk.com. Staff agrees that Sprint/Nextel is providing local voice service in the Farmington exchange. The Commission finds that the wireless company Sprint/Nextel is providing local voice service in Farmington.

SBC Missouri claims that its second competitor is Big River Telecommunications; the basis of SBC Missouri's evidence here is its records regarding migrations from UNE-P to CLEC facilities. Staff contends that a qualifying competitor is not providing residential local voice service on a full facility basis or UNE-L basis in the Farmington exchange.⁴⁷ Staff, however, considers "line served on a full facility basis or UNE-L basis as the minimum threshold to meet for competitive status in a 30-day proceeding. Full facility based lines involve lines owned by the company."⁴⁸ Staff indicates that it selected this minimum threshold because it reflects a situation where the company, or its affiliate, owns certain facilities in the provisioning of service.⁴⁹

As discussed in the section on the Bonne Terre exchange (under Business Services), the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). SBC Missouri has provided evidence that Big River Telecommunications is migrating from UNE-P to a partial or full facilities-based system. Therefore, the Commission finds that SBC Missouri has shown that there are two qualifying competitors in this exchange.

2. San Antonio

For the San Antonio exchange, SBC Missouri indicates that the second competitor is the wireless company, Verizon.⁵⁰ According to SBC Missouri, the source of its data for the wireless competitors is the web site "LetsTalk.com."⁵¹ Staff agrees that Verizon is providing local voice service in the San Antonio exchange. The Commission also finds that the wireless company Verizon is providing local voice service in the exchange of San Antonio.

In the San Antonio exchange, SBC Missouri identifies Sprint as its competitor, and indicates that its position is based upon E-911 listings.⁵² Staff, however, indicates that it has been unable to verify from independent evidence that a qualifying UNE-L or facilities-based provider is providing local voice service within the San Antonio exchange.

As previously noted, the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to UNE-L (or facilities-based) in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). No party offered evidence that Big River Telecommunications is a qualified UNE-L or facilities-based pro-

⁴⁷ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15.

⁴⁸ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 7.

⁴⁹ Exh. 6, Amended Direct Testimony of John Van Eschen, pp. 7-8.

⁵⁰ Exh. 3 (Exchange Chart).

⁵¹ Id.

⁵² Id.

vider. The Commission finds that SBC Missouri has not provided sufficient evidence supporting the presence of a second qualifying competitor in the San Antonio exchange.

3. Sikeston

SBC Missouri lists Verizon as its wireless competitor. Staff agrees that Verizon, a wireless company, is providing local voice service in the Sikeston exchange. The Commission also finds that the wireless company Verizon is providing local voice service in the exchange of San Antonio.

SBC Missouri also identifies Big River Telecommunications as a competitor in the Sikeston exchange, based on directory listings.⁵³ Staff, however, indicates that it was unable to verify from independent evidence that a qualifying UNE-L or facilities-based provider is providing local voice service within this exchange.

As discussed in the section on the Bonne Terre exchange (under Business Services), the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). No party offered evidence that Big River Telecommunications is a qualified UNE-L or facilities-based provider. The Commission finds that SBC Missouri has not provided sufficient evidence supporting the presence of a second qualifying competitor in the Sikeston exchange.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction over this matter pursuant to Section 392.245.5, RSMo. This statutory provision requires the Commission, within 30 days, to determine whether the requisite number of entities is providing basic local telecommunications services to business or residential customers, or both, in the requested exchange and to approve tariffs designating services as competitive if such a determination is made:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

For the purpose of competitive status, one CMRS provider can be considered an entity providing "basic local telecommunications services."⁵⁴ The statute also requires the Commission to consider as a "basic local telecommunications

⁵³ Id.

⁵⁴ Section 392.245.5(1), RSMo Supp. 2005.

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service provider” any entity providing “local voice” service “in whole or in part” over facilities in which it or one of its affiliates has an ownership interest.⁵⁵

Senate Bill 237 defines “local voice service” as meaning “[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo.”⁵⁶

The statute defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service.”⁵⁷

The Missouri Supreme Court has stated that “[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a preposition bears the burden of proving that preposition.”⁵⁸ SBC Missouri asserts that there are the requisite numbers of entities providing basic local service to business or residential customers, or both, in an exchange. Therefore, SBC Missouri has the burden of proof.

The Commission also finds that due process and issues of fundamental fairness require that SBC Missouri name, in its petition, all exchanges in which it seeks competitive classification.

Subdivision (2) of Section 392.245.5 requires the wireline entity to provide local voice service in whole or in part “over” telecommunications facilities or other facilities in which it or one of its affiliates has an ownership interest. The American Heritage College Dictionary, Third Edition, provides the following applicable definition of “over”: “Through the medium of.” The Commission concludes that a wireline entity providing local voice service through either a partial or full facilities basis meets the standard. Where the wireline entity and its affiliates own neither the loops nor the switch, the wireline entity is not providing local voice service “over,” *i.e.*, through the medium of, facilities in which it or its affiliates have an ownership interest.

Applying the facts to the relevant law, the Commission concludes that the evidence satisfies the 30-day criteria in Section 392.245.5 in the following exchanges because the evidence shows that for each of these exchanges, there is (1) at least one non-affiliated entity providing “local voice” service in whole or in part over facilities in which it or one of its affiliate has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245(3), and (2) at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1):

⁵⁵ Section 386.020(52), RSMo (2005).

⁵⁶ Section 392.245.5(3), RSMo Supp. 2005.

⁵⁷ Section 386.020(52), RSMo Supp. 2005.

⁵⁸ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

Exchanges for Business Services: Antonia, Bonne Terre, Camdenton, Cape Girardeau, Chesterfield, Clever, Eldon, Eureka, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculaneum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Manchester, Marble Hill, Maxville, Moberly, Monett, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, and Washington; and

Exchanges for Residential Services: Advance, Bell City, Chesterfield, Delta, Eureka, Farmington, Fenton, Fredericktown, Harvester, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pochontas-New Wells, Pond, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

IT IS THEREFORE ORDERED:

1. That Staff's motion, filed September 23, 2005, to reopen the record and waive rule 4 CSR 240.2.110(8), is granted. The Supplemental Direct Testimony of John Van Eschen, filed on September 23, 2005, is received into the record as Exhibit 9.

2. That the application of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification is granted in part and denied in part.

3. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for business services for the following 45 exchanges:

Antonia, Bonne Terre, Camdenton, Cape Girardeau, Chesterfield, Clever, Eldon, Eureka, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculaneum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Manchester, Marble Hill, Maxville, Monett, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, and Washington.

4. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for residential services for the following 26 exchanges:

Advance, Bell City, Chesterfield, Delta, Eureka, Farmington, Fenton, Fredericktown, Harvester, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pochontas-New Wells, Pond, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

5. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for business services is rejected for the following 16 exchanges: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Excelsior Springs, Farley, Linn, Marshall, Mexico, Moberly, Montgomery City, St. Clair, and Union.

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6. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for residential services is rejected for the following 3 exchanges: Joplin, San Antonio, and Sikeston.

7. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for business services in the exchanges listed in ordered paragraph 4 shall be considered in Case No. TO-2006-0102, unless SBC Missouri files, no later than 9:00 a.m. on September 28, 2005, a notice indicating that it prefers to file a new petition for these exchanges.

8. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for residential services in the exchanges of listed in ordered paragraph 5 shall be considered in Case No. TO-2006-0102, unless SBC Missouri files, no later than 9:00 a.m. on September 28, 2005, a notice indicating that it prefers to file a new petition for these exchanges.

9. That the proposed tariff sheets (Tariff File No. YI-2006-0144) are rejected.

10. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is authorized to file proposed tariff sheets in conformance with this order.

11. That this Report and Order shall become effective on September 29, 2005.

12. That this case may be closed on September 30, 2005.

Davis, Chm., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., dissent, with separate
dissenting opinions to follow:
certify compliance with Section 536.080, RSMo 2000.

OPINION OF COMMISSIONER ROBERT M. CLAYTON III DISSENTING, IN PART, AND CONCURRING, IN PART

This Commissioner dissents with the majority's Report and Order granting competitive status in certain of the applicant's exchanges pursuant to the newly revised §392.245, RSMo., 2005.¹ This Commissioner believes that there is a lack of evidence to support the findings that all of the exchanges listed by SBC meet the statutory criteria for competitive classification. This Commissioner does, however, concur with how the majority decided issues involving a number of the exchanges in question, whether in making a finding of adequate competitive presence or in delaying the decision for additional evidence. This dissent will set out the points with which this Commissioner agrees and disagrees.

PROCEDURAL CONCERNS

This case is the second² to be brought before the Commission regarding the newly crafted statute for large incumbent local telephone providers to request competitive classification and subsequent pricing deregulation. The statute in

¹ All statutory references are made to Revised Statutes of Missouri, 2005.

² See, *In Re Sprint*, Case No. IO-2006-0092.

question, §392.245, sets out the mechanism whereby a company may request that classification and the type of evidence necessary to make the determination.

First, while this Commissioner appreciates the need for setting time lines and encouraging prompt rulings, this Commissioner has noted³ that the schedule for adjudicating such a case is unusually short. The case must be filed, prosecuted and decided within 30 days. This is not enough time to make a thorough examination of the evidence and fully evaluate the information supplied by the company and by the Commission staff.

Secondly, the type of information the parties have supplied is simply inadequate for the Commission to make a supportable decision addressing the presence of competition in each exchange. Much of the evidence has been second-hand or third-hand information, unverifiable and untested. The Commission cannot cross-examine a webpage or a phone directory. Without an adequate review of the record, some customers may face an unfriendly marketplace without enough competitive forces to protect them.

Some have argued that business and official records can be added to the record, subject to authentication and adequate foundation, but much of that evidence is out of date. The Commission's Annual Reports used by Staff consist of 2004 data. Much has occurred in telecommunications in recent years, casting doubt on the relevance of such documents, including the recently issued *USTA II* and *Brand X* Supreme Court decisions, the FCC's *Triennial Review Remand Order*, the mergers of large nationwide carriers (SBC-AT&T, Sprint-Nextel, Verizon-MCI), Universal Service Fund and ETC Reform, new FCC Orders relating to billing, intercarrier compensation and enhanced records exchange rules, not to mention the Telecom Act of 2006 and additional proposals at both the state and federal level. Each of these events has resulted in change to the competitive landscape and serve to cast doubt on the accuracy and relevance of the 2004 data in question.

Thirdly, this Commissioner is concerned with the definitions presented by the parties and the suggested intent of the legislature. It is this Commissioner's opinion that the General Assembly intended to open up only those exchanges in which competition is present and multiple providers available for hire by customers. Regulation stands in the place of competition when there is an absence of competition in the marketplace or when one provider may act without discipline from competitive pressures. When consumers have a choice of services and providers, less regulation is needed in the marketplace. The majority's interpretation of the statute deregulates the market when the market may not be ready.

CONCURRENCE

This Commissioner concurs with the majority that competent and substantial evidence established that certain exchanges met the criteria allowing SBC to be free from pricing regulation. Although there is a question as to the admissibility of certain types of evidence and whether a number of the pieces of evidence carried enough weight to support the majority's Report and Order, this Commissioner was satisfied that two competitors are providing some level of basic local telecommunications service in the following exchanges:

³ See, Opinion of Commissioner Clayton, Case No. IO-2006-0092.

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Competitive Classification for Residential Services:

Advance	Bell City	Chesterfield	Delta	Eureka
Fenton	Fredericktown	Harvester	Kansas City	Manchester
Monett	Nevada	Perryville	Pocahontas-New	Wells
Pond	Springfield	St. Charles	St. Genevieve	St. Joseph
St. Louis	Valley Park	Wyatt		

Competitive Classification for Business Services:

Antonia	Camdenton	Cape Girardeau	Chesterfield	Eldon
Eureka	Fenton	Festus-Crystal City	Fredericktown	Fulton
Gravois Mills	Harvester	Herculaneum-Pevely	High Ridge	Imperial
Jackson	Joplin	Kansas City	Lake Ozark-Osage	Beach
Manchester	Maxville	Monett	Nevada	Perryville
Pond	Poplar Bluff	Scott City	Sikeston	Springfield
St. Charles	St. Genevieve	St. Joseph	St. Louis	Valley Park

This Commissioner also agrees with the majority's decision to withhold judgment on a number of exchanges not specifically named in the applicant's petition. The decision on those exchanges will be made in the 60-day in Case No. TO-2006-0102. The competitors, customers and potential intervenors should be given a full opportunity to participate in the case and the analysis of the evidence. The concept of due process requires such notice and deliberation, especially in light of the shortened timelines. The following exchanges will be reviewed in the next case:

For Residential Services: Joplin.

For Business Services:

Archie	Ash Grove	Billings	Boonville
Carthage	Cedar Hill	Chaffee	Farley
Linn	Marshall	Mexico	Moberly
Montgomery City		St. Clair	Union

DISSENT

With regard to the remaining exchanges in SBC's request, this Commissioner was not satisfied with the sufficiency or quality of the evidence to show that the statutory criteria were met which, in turn, failed to convince this Commissioner that enough competition was present in the given exchanges. These remaining exchanges can be grouped into two categories for lack of competitive presence: lack of wireline competition or lack of evidence of wireless competition.

A. Lack of Wireline Competition

This Commissioner believes that certain exchanges lack an alternative wireline provider operating in the exchange. These exchanges include the following:

For Residential Services: San Antonio and Sikeston.⁴

For Business Services: Bonne Terre, Excelsior Springs and Marble Hill.⁵

⁴ The majority did not declare these exchanges competitive and this Commissioner concurs in that result. However, for purposes of consistency and clarity, the exchanges are grouped together because they should be treated in the same manner.

⁵ The majority found that Bonne Terre and Marble Hill were competitive, but did not find competition in the exchange of Excelsior Springs. These exchanges are grouped together based on the same reasoning.

The statute requires that the competitive provider be offering “local voice” service “in whole or in part” over facilities in which it or one of its affiliates has an ownership interest. One of the few disputes among the parties, including Staff, Office of Public Counsel and SBC, is defining the phrase “in whole or in part.”

There is no dispute if a provider is offering service on a “full facilities-based” system, meaning that the service is offered “in whole” on the competitor’s own system. However, Staff has argued that an alternative provider must meet a “minimum threshold” of owning a certain amount of its system. Staff argues that “in part” requires a company be providing service on a UNE-L⁶ basis. In such a circumstance, a provider uses its own switch in conjunction with the incumbent’s “loop,” the connection from the switch to the customer’s premises. In the converse, Staff argues that as an alternative that the competitor could also own its own loop and use the switch of another party to satisfy its standard of facilities ownership. Staff asserts that such a “minimal threshold” is necessary because a competitor must own a sufficient amount of its facilities to achieve independence from the incumbent. If a competitor is not adequately insulated from the facilities or business plan of the incumbent, the competitor cannot act as a disciplining force in the marketplace. SBC, in contrast, has interpreted that competitor ownership of any amount of equipment or facilities as defined in §386.020(52), satisfies the statute.

This Commissioner believes that the General Assembly intended that the competitor own more than a billing office, a single piece of real estate or a cross-arm telephone pole. There must be a sufficient amount of facilities owned by the competitor to fully afford an amount of independence to provide service independently, and competitively, with the incumbent. Staff makes a compelling argument for its “minimum threshold” and this Commissioner agrees.

Therefore, this Commissioner dissents in the finding of competition for the above-referenced exchanges based on a lack of presence of an alternative, wireline competitor in the exchange. In the San Antonio exchange, the evidence indicated the presence of a UNE-P provider, but insufficient evidence to support a finding of any other wireline competition. In Sikeston and Marble Hill, there was some evidence that Big River Telephone is providing some type of local service but the evidence did not support the finding of the “minimum threshold” suggested by Staff. Finally, in Excelsior Springs, it was not clear in the record whether any customers were being served in the exchange. This Commissioner does not believe the General Assembly intended that such minimal competitive presence in a community would lead to pricing deregulation.

B. Inadequate Presence of Wireless Local Service

The second category for which this Commissioner dissents is with regard to wireless service offered in an exchange and the use of that provider in the analysis for competitive status. Competitive classification should be denied based on lack of competitive wireless presence in the following exchanges:

⁶ Unbundled Network Element-Loops. See, *In the Matter of Unbundled Access to Network Elements*, WC Docket 04-313, Order on Remand, (“Triennial Review Remand Order”) released February 4, 2005, at ¶200.

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For Residential Services: Farmington, Pacific, Smithville and Washington.**For Business Services:**

Bonne Terre	Clever	Excelsior Springs	Farmington
Flat River	Grain Valley	Greenwood	Pacific
Smithville	Washington		

In each of these exchanges, the applicant has used §392.245.5(1), in compiling the list of competition by referencing one wireless provider. The applicant supplied a limited amount of information regarding the presence of a wireless carrier in an exchange, and in many cases the evidence to support the assertion was a review of a website called "LetsTalk.com." Supposedly a review of that website shows that a customer can receive wireless service in that area or exchange. Staff indicated its concurrence by scanning websites of the wireless companies, the FCC wireless webpage and the Missouri Office of Administration 9-1-1 availability website.

Wireless or CMRS providers may be counted in the analysis of reclassifying an exchange as competitive. "Commercial mobile service providers as identified in 47 U.S.C. Section 332(d)(1) and 47 C.F.R. Parts 22 or 24 shall be considered as entities providing basic local telecommunications service, provided that only one such non-affiliated provider shall be considered as providing basic local telecommunications service within an exchange". §392.245.5(1). The statute does not appear to describe a specific level of service in a given exchange. If one were to strictly construe the reading of the statute, any CMRS provider should be counted regardless of whether it actually provides any level of service in the subject exchange. The only requirement is that it must be "providing basic local telecommunications service. . ." within the exchange.

The definition of "basic local telecommunications service"⁷ is very loosely defined in that the language "any of the following" would permit even the least

⁷ "Basic local telecommunications service," pursuant to §386.020(4), is defined as two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges:

(a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;

(b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;

(c) Access to local emergency services including, but not limited to, 911 service established by local authorities;

(d) Access to basic local operator services;

(e) Access to basic local directory assistance;

(f) Standard intercept service;

(g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;

(h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations.

amount of service offering as falling under the definition. The options range from having a single cell tower in a remote corner of the exchange and serving one customer to a full offering of services including local service, local phone numbers and local offices promoting, and supporting, the offered service.

The new statute provides an additional requirement for all types of service, including CMRS service. In parsing the relevant statutes, carriers that may be considered when evaluating an exchange must be "providing basic local telecommunications service to . . . customers within the exchange." In addition, §392.245.5(3) requires that, "Regardless of the technology utilized, local voice service shall mean **two-way voice service capable of receiving calls from a provider of basic local telecommunications services** as defined by subdivision (4) of §386.020" (emphasis added). That section defines "basic local telecommunications service" as "two-way switched voice service **within a local calling scope** as determined by the commission comprised of any of the following services . . ." (emphasis added §386.020(4)). This definition recognizes boundaries of a "two-way" service within a "local calling scope."

Lastly, the new statutory language of §392.245 provides additional guidance, by what terms are not referenced. The term "interexchange telecommunications service," which is defined as "service between points in **two or more exchanges**," (emphasis added) §386.020(24), also known as long distance or toll calling service, is not mentioned in the new section.

If Customer A lives in a given exchange and wishes to exclusively use wireless service, it constitutes local service only if wireline customers in that exchange can call Customer A as a local call. The only meaning that can be given to "capable of receiving calls from a basic local telecommunications service provider" is to assume that the wireline calling party only has access to local service and is not capable of making long-distance or toll calls. The only way a CMRS provider (or any other potential competitor) can count as a competitor under §392.245.5, is if the incumbent local exchange carrier has rated the call in its switch as a local call. This is usually, but not always, done by the assignment of a specific "NXX" (the three-digit number that associates the telephone number with the exchange), depending on the vintage and capabilities of the local switch. Additionally, the rating of the call as local can be accomplished through different types of interconnections or interconnection agreements. It should be noted that the rating of such a number as local or non-local is almost entirely within the purview of the entity seeking competitive classification in the exchange. If a wireline customer wishes to dial a neighbor's wireless phone, the number for which has been procured from a different community or different "NXX," then the call is a long distance call and must be routed through an interexchange carrier. That wireless customer is actually receiving the call from an interexchange carrier and is not capable of receiving calls from the basic local service provider.

In reviewing the evidence supplied by the parties, the record was largely deficient of reference to whether the competing wireless carrier provided service to customers in those exchanges or whether it was even able to assign locally-rated numbers in a customer's home exchange. Only after Commission inquiries did the parties offer evidence of local wireless phone numbers or local wireless

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presence in some of the exchanges. In some of the exchanges where no local phone numbers were identified, Staff established the presence of Extended Area Service (EAS)⁸ routes which enabled local, toll free calling to another exchange. Additionally, Staff illustrated how EAS routes could also be used in connection with Metropolitan Calling Area⁹ territories to permit unlimited local calling. Staff identified another possible explanation for toll free local calling through the use of different types of interconnections, however, no evidence was presented for any of these exchanges regarding the existence of such interconnections. This material is possessed by phone companies and not by the Staff.

In the exchanges listed above, wireless customers do not have the choice or option of a local phone number or local service. These exchanges do not have an EAS route to send the call, toll free, through another adjacent exchange. Even in suburban communities within MCA territories, there was insufficient evidence to establish the ability of a customer to connect a local call within the respective community. While it is generally assumed that there are more wireless services and providers in metropolitan areas, the evidence did not establish that a single provider held itself out to each community as a local services provider.

The statute, being brand-new, does contain some confusing and possibly conflicting provisions. It is incumbent on this Commission to read the sections within the statute harmoniously whenever possible, and to give meaning to all the sections of the statute. There is no evidence in the record that CMRS carriers are providing service in the exchanges at issue, and there is no evidence in the record that a provider of basic local service (and nothing else) can complete a call to users of that CMRS service. This Commission should require a level of service for those customers that is comparable to the wireline service before granting competitive classification. This is especially the case in rural areas with far fewer competitive choices.

CONCLUSION

In conclusion, the Commission should demand that the parties supply competent, direct, first-hand knowledge-based evidence in pre-filed testimony and at hearing. The Report and Order should not be based on hearsay information retrieved from webpages and telephone listings, from advertisements and data taken from out-of-date reports filed by third parties. The evidence must establish the statutorily required number of basic local service providers serving customers in each exchange. Only after a comprehensive review of direct evidence, based on

⁸ "Extended Area Service" known as EAS is defined as "[a] novel name for a larger than normal local telephone calling area. The local phone company extends it subscribers the option of paying less per month for a small calling area and paying extra per individual call outside that area (i.e. the extended area), or paying more per month flat rate but having a larger calling area (i.e. having extended area service)." Harry Newton, *Newton's Telecom Dictionary*, p. 413 (10th Ed. 1996).

⁹ See, *In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges*, Report and Order, Case No. TO-92-306, for definition of Metropolitan Calling Areas (MCA).

first-hand knowledge, establishing the presence of competition in an exchange, should the Commission unleash the applicant's unbridled pricing "flexibility."

For the foregoing reasons, this Commissioner respectfully dissents.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

In its Report and Order in the above-captioned docket, the majority grants SBC Missouri's request for competitive classification for business services in 44 exchanges and for residential services in 26 exchanges. Under the recently passed SB 237 (Section 392.245.5 RSMo), an incumbent provider may seek competitive classification based upon the presence of two other carriers providing basic local telecommunications service in the exchange. For purposes of determining whether two such entities are operating in an exchange, the Commission may consider the presence of a commercial mobile radio service provider as an entity providing basic local telecommunications service. The second provider must, therefore, be an entity providing local voice service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.

In SB 237 the legislature drastically reduced the level of proof necessary for consumers to lose protection against significant price increases. As a consequence, it is more important than ever to ensure that the requirements for removal of price increase protections that do remain are fully met before these protections are removed.

As I previously indicated in my dissent in Case No. IO-2006-0092, I have significant concerns regarding the nature of the services provided by any wireless entity counted by the Commission in its determination of competitive status. The majority of the Commission appear willing to include any wireless provider with a presence in an exchange as a competitor to the incumbent. It appears under the majority's Order that this presence may as little as a cellular tower used to provide service to those customers traveling through the exchange. I continue to assert that Section 392.245.5 requires a greater competitive presence for such wireless competitors.

Section 392.245.5 specifically requires that the Commission find two alternative carriers providing "basic local telecommunications service" within an exchange prior to granting competitive classification. Section 386.020(4) defines basic local telecommunications service as a "two-way switched voice service within a local calling scope." Thus the wireless service must be offered to customers having an address within the exchange. Moreover, this definitional section clearly contemplates that basic local telecommunications service should be provided without the incurrence of a toll charge. Therefore, the requirement that the wireless carrier provide basic local telecommunications service must necessarily require more than the mere presence of a cellular tower used to provide service to travelers. Rather, the statute requires that the wireless carrier be an actual competitive alternative for the residents of that exchange. That is to say, a customer within an exchange must be able to obtain service from the wireless

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carrier at an address in the exchange such that the customer may make and receive a "two-way switched voice" call within the exchange at no additional charge to the caller.

The evidence in this proceeding was not adequate for the Commission to determine whether this is the wireless service offered in each exchange in question. While there may be such wireless competitors, a more in-depth review of the services offered by those wireless entities should have been undertaken.

As a final note this case will result in a number of exchanges having residential services without protection against price increases even though the market share of SBC in that exchange is more than 90% compared to wireline competition. Business services in an exchange may be in a similar position. Some wireline business competitions only market or serve very large businesses. This means that in some exchanges small businesses may in fact have no other wireline competition seeking to serve them other than SBC. This is not sufficient competition to act as a substitute for price oversight and does not ensure just and reasonable prices. The only other safety valve for consumers in the legislation is the extent of wireless presence in the exchange. This Commission should require that the wireless carriers activity in the exchange have a minimum level of presence. Because this decision makes no such requirement, I must dissent.

**In the Matter of an Investigation into the Status of Missouri's
Natural Gas Local Distribution Companies' Compliance with
Commission Rule 4 CSR 240-40.018.***

*Case No. GW-2006-0110
Decided September 27, 2005*

Gas §2. Natural Gas Utilities must structure their portfolios of contracts with various supply and pricing provisions in an effort to mitigate upward natural gas price spikes, and provide a level of stability of delivered natural gas prices.

Gas §7. The Commission can open a case for the purpose of investigating the status of natural gas utilities' compliance with 4 CSR 240-40.018 and can take evidence on the record concerning that compliance.

Gas §17.1. Every season before the winter heating season starts and before utilities raise their rates through the Purchased Gas Adjustment process, Public Counsel stated that they should be required to demonstrate their compliance with 4 CSR 240-40.018.

Evidence, Practice and Procedure §18. A docketed case will allow the Commission to take evidence and create a record that documents the natural gas utilities' efforts to keep the delivered price of natural gas stable.

ORDER ESTABLISHING CASE

Procedural History and Positions of the Parties:

On September 12, 2005, the Public Counsel filed his Motion to Open a New Case, wherein he prayed that the Commission would "open a case for the purpose of investigating the status of natural gas utilities' compliance with 4 CSR 240-40.018, and that it take evidence on the record concerning that compliance."

In support of his Motion, Public Counsel stated that in 2003, the Commission promulgated Rule 4 CSR 240-40.018, which requires natural gas utilities to "structure their portfolios of contracts with various supply and pricing provisions in an effort to mitigate upward natural gas price spikes, and provide a level of stability of delivered natural gas prices." Public Counsel further stated that "all indications point to wholesale natural gas prices for the upcoming winter reaching record highs." Even if the winter proves to be a mild one, Public Counsel opined that "high end-user gas prices will create serious hardship to many customers" and that "[a] harsh winter coupled with record-high prices will cause untoward human suffering and severe economic disruption." Under these circumstances, Public Counsel asserted, "It is incumbent on the Commission to ensure that natural gas utilities have done everything in their power to mitigate price spikes and keep rates stable."

* The Commission, in an order issued on March 29, 2006, closed this case. That order noted that parties filed their final report with the Commission on February 27, 2006. On March 16, 2006, they presented and discussed the report with the Commission during the Commission's agenda. The Commission noted the investigation had been completed, no further Commission action was required, therefore the case was closed.

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Public Counsel noted that, in its Agenda meeting on September 6, 2005, the Commission discussed beginning a process in which natural gas utilities would make presentations on their efforts to comply with 4 CSR 240-40.018. Public Counsel urged the Commission to structure its investigation as a formal one in a docketed case. The benefit, in Public Counsel's view, is that a docketed case will allow the Commission to take evidence and create a record that documents the natural gas utilities' efforts to keep the delivered price of natural gas stable. Before the winter heating season begins, and before utilities raise their rates through the Purchased Gas Adjustment (PGA) process, Public Counsel stated that they should be required to demonstrate their compliance with the rule.

Public Counsel further stated that, while some information about specific contracts, prices, and hedging strategies may not be public information, this should not dissuade the Commission from opening a case and taking evidence on the record. The Commission can issue its standard protective order to protect such information.

Public Counsel suggested that the Commission docket this case with a "GW" designation. This type of investigation case does not typically culminate in a Commission order, but rather in a report from the participants in the investigation. This type of case is not considered contested, so that the Commission may confer with members of its Staff.¹ Creating an investigation case, Public Counsel stated, "strikes a balance between a free flow of information and the need to create a record documenting compliance."

Public Counsel also suggested that if, during the course of the investigation case, it appears that a utility has not fully complied with Rule 4 CSR 240-40.018, the Commission should immediately institute a complaint against that utility. Furthermore, if the investigation, or the events of the upcoming winter, shows that the current rule did not prompt utilities to undertake adequate actions to mitigate price spikes and keep prices stable, the Commission "should revise the currently toothless rule to provide significant penalties (such as imputed lower gas costs) for noncompliance."

On September 14, the Commission directed notice to Missouri local distribution companies and gas corporations and gave them an opportunity to respond to Public Counsel's motion by October 4. The Commission also directed its Staff to file a Recommendation and Memorandum by the same date. On September 20, the response deadline was shortened to Noon on September 26.

The Commission received timely responses from the Missouri Gas Utilities and Aquila, Inc., as well as Staff's Memorandum and Recommendation.

The Missouri Gas Utilities include Laclede Gas Company, Missouri Gas Energy, a division of Southern Union Company, Atmos Energy Corporation, Fidelity Natural Gas, Inc., and Southern Missouri Gas Company, L.P. These companies oppose Public Counsel's motion for several reasons. First, on the grounds that "there is no good reason why the Commission should cast aside this long-standing procedure [i.e., the PGA/ACA process with its prudence review] in favor of

¹ The Commission does not necessarily endorse or concur with the Public Counsel's opinion regarding the application of the *ex parte* rule to this proceeding.

a hasty 'investigation' of practices and activities that are still underway and not yet completed." Second, they complain that Public Counsel's motion creates the misimpression that looming high gas prices are somehow the fault of the Missouri LDCs rather than a number of factors outside their control, including two recent hurricanes. Third, the investigation would place an unnecessary and distracting burden on the very company personnel who are charged with attempting to ameliorate the threatening gas price situation. Finally, the Missouri LDCs are already in the process of making informal presentations to the Commission on this very topic. They state that they will be happy to make the same presentations to the Public Counsel.

Aquila also opposes Public Counsel's motion. Aquila notes that it has already provided this information to the Commission in several forms. Aquila echoes the Missouri Gas Utilities in noting that the opening of such a case now would interfere with the efforts of the personnel who are busy trying to obtain gas at reasonable prices for the coming winter. Finally, Aquila notes that the LDCs' plans are already made at this point, merely five weeks prior to the start of the winter heating season. An investigation now, Aquila asserts, can have no beneficial result.

Staff, on the other hand, supports Public Counsel's motion. In its Recommendation, Staff states "The Staff agrees with OPC that such an investigation may prove helpful to the Commission. As a first step, the Staff suggests that the Commission incorporate into the record in this case all the presentations that the natural gas LDCs under the Commission's rate jurisdiction have or will make to the Commission in its agenda sessions." Staff further offers both some guidance as to the scope of the investigation and some cautions:

I. Things That the Investigation Should Consider

1. An investigation of the LDCs' hedging activities this year will provide the Commission the ability to consider what might be an appropriate time cycle for hedging natural gas prices and the factors that influence this decision.
2. The investigation will give the Commission the opportunity to review and evaluate the instrumentalities available to Missouri utilities to hedge.
3. The investigation will give the Commission the opportunity to review and consider the costs of the different hedging vehicles available to Missouri utilities. These include, but are not limited to: storage, fixed price contracts, swaps, call options, futures contracts, and other financial instruments.
4. The investigation might provide an opportunity for the Commission to develop some common hedging elements that could be incorporated into its hedging rule.
5. Unlike OPC, Staff does not believe that this case should result in the Commission ordering Staff to file complaint cases. The Staff, and OPC if it wishes to do so, will

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audit each of the LDCs for prudence of its gas purchasing practices, and can recommend or file complaints after that review.

6. The investigation will provide the Commission with the opportunity to advise, if it deems appropriate, the participants in the current SB 179 Roundtable to explicitly consider appropriate fuel cost hedging practices in light of these proceedings.

7. The investigation will also permit the Commission to direct additional customer notifications concerning the price of natural gas if the Commission determines that additional notice is necessary.

II. Some Cautions

1. The Staff notes that purchased-gas factors are calculated in accord with each utility's tariffed Purchased Gas Adjustment (PGA) clause. Missouri LDCs plan to meet cashflow needs, particularly the cost of buying natural gas, in conformity with their approved tariffs. If properly calculated natural gas costs are not timely billed financial disruptions might ensue.

2. The prudence evaluation of each LDC's purchasing practice is undertaken in the ACA audit at the end of each LDC's ACA period. To attempt such a review before the end of the ACA period would be premature.

3. Past task force, working group and case related reviews of LDC hedging practices has shown that rigid specifications for utility hedging practices or actions in a rule is fraught with problems. Market and utility specific conditions can change rapidly and these, as well as other factors, can change what the reasonable or appropriate course of action would be at any given point in time. While the Commission can offer guidance to utilities' making these decisions through past orders and rules, utility management has the obligation to act prudently in light of customer needs and changing conditions.

Discussion:

Having considered Public Counsel's motion, the responses of the LDCs and Staff's Recommendation, the Commission hereby establishes a case in order to investigate "the status of natural gas utilities' compliance with 4 CSR 240-40.018." The Commission agrees with Public Counsel that the ratepaying public faces a winter season of unprecedented natural gas prices. While the factors causing

these prices may be outside of the control of the gas utilities, it is nonetheless more important than ever that the LDCs pursue gas acquisition strategies that will ameliorate price spikes. The Commission will take evidence on this issue as requested by Public Counsel. At this time, there is no allegation of any imprudence by any Missouri LDC. However, should the record demonstrate the need, Staff may seek authority from the Commission to file and pursue complaints.

IT IS THEREFORE ORDERED:

1. That the Motion to Open a New Case filed by the Public Counsel on September 12, 2005, is granted.
2. That all Missouri certificated gas corporations are made parties to this case. The Data Center shall add them to the Service List maintained in this matter.
3. That a prehearing conference will be held at 10:00 a.m. on October 5, 2005, in Room 305 of the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, a building that meets accessibility standards required by the Americans with Disabilities Act. If any person needs additional accommodations to participate in the prehearing conference, please call the Missouri Public Service Commission's Hotline at 800-392-4211 (voice) or Relay Missouri at 711 prior to the hearing.
4. That this order shall become effective on September 27, 2005.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

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**In the Matter of the Small Company Rate Increase Request of
Mill Creek Sewers, Inc.**

*Case No. SR-2005-0116
Decided September 29, 2005*

Sewer §3. It is the obligation of the utility to provide safe and adequate sewer service to their customers. The Commission approves a tariff that will enable Mill Creek Sewers, Inc. to do so.

Sewer §14. Mill Creek Sewers proposes a rate increase from \$5 a month to \$30.11 a month and the Commission approves it. This is the amount that they have figured is necessary in order to properly run the system. The increase does not include a return on the rate base, but reflects only the necessary costs.

Sewer §17. The Commission held that a failure to increase the tariff would lead to a violation of §393.130.1 which requires that every sewer company provides safe and adequate service.

Service §18. Mill Creek Sewers received a number of written customer complaints which claimed damaged real property and sewage backup, a lack of customer service and customers having to repair the sewage system. It is the obligation of the utility to provide safe and adequate sewer service to their customers.

Service §44. The Commission held that without the proper funding or rate increase, Mill Creek Sewers would be unable to serve their customers properly.

ORDER APPROVING TARIFF AND AGREEMENT

On October 27, 2004, Mill Creek Sewers, Inc., requested approval from the Missouri Public Service Commission to revise its tariff. The tariff had an effective date of December 13, 2004. Mill Creek serves approximately 75 customers who currently pay \$5.00 per month for sewer service. The proposed tariff raises the amount customers would pay to \$30.11. As reflected in an agreement between the Staff of the Commission and Mill Creek Sewer, \$26,741/year, rather than the current \$4,440/year, is needed to properly run the system. The increase does not include a return on the rate base, but reflects only the necessary costs.

Upon receiving a number a written customer complaints, through the Office of the Public Counsel, the Commission suspended the tariff in order to allow time for a local public hearing. The Commission held the local public hearing on January 24, 2005.

Due to the testimony of Mill Creek's customers, concerning complaints ranging from damaged real property and sewage backup to the lack of customer service and customers having to repair the sewage system because the owner was either unwilling or unable to do so, the Commission was reluctant to grant an increase under the current ownership and further suspended the tariff, which now has an effective date of October 12, 2005. This suspension was also put in place in light of Staff informing the Commission that the St. Louis Metropolitan Sewer District (MSD) was interested in purchasing Mill Creek.

While MSD pondered its interest in Mill Creek, the Commission directed its Staff to file weekly reports on the condition of Mill Creek, with the intent of making the system fully operational. Recently, however, the Commission was informed that MSD has no immediate interest in purchasing Mill Creek, at least not prior to the tariff effective date of October 12, 2005. Through the efforts of Staff, particularly Steve Loethen, and with the cooperation of the owner of Mill Creek, Joseph Afshari, the system is operational. Further Mr. Afshari has contracted with Testing Analysis and Control to operate the facility. As indicated in a pleading filed by Mill Creek on September 28, Testing Analysis and Control will also consider entering into a contract with Mill Creek to control the financial operations of the company. However, Testing Analysis and Control will not consider such a contract unless the Commission approves the proposed tariff, which will provide the company with the necessary revenue to properly operate Mill Creek.

Although the Commission would rather that someone other than Mr. Afshari be financially responsible for Mill Creek, this option is not reasonable in light of the time constraint placed on the Commission of the effective date of the tariff. Aware that Testing Analysis and Control is interested in being financially responsible for Mill Creek, the Commission finds some solace in an entity other than Mr. Afshari being financially responsible for Mill Creek. The Commission will, however, continually and actively seek a replacement for Mr. Afshari.

Section 393.130.1 requires every sewer company to provide safe and adequate service. Section 393.140(2) charges the Commission with the responsibility to investigate the condition of sewer companies under its jurisdiction and empowers the Commission to order reasonable improvements "as will best promote the public interest, preserve the public health and protect those using such . . . sewer system." The Commission is therefore faced with the dilemma of granting the rate increase under the current ownership or rejecting the tariff and putting the customers of Mill Creek at risk of receiving unsafe and inadequate sewer service. The Commission finds that \$30.11 per month/customer is just and reasonable and necessary to sustain the ongoing costs to operate Mill Creek Sewer safely and adequately. The Commission will therefore approve the proposed tariff, Tariff No. YS-2005-0330.

The Commission has also reviewed the Agreement Regarding Disposition of Small Company Rate Increase Request (including the two supplemental agreements) between Staff, Public Counsel, and Mill Creek, and finding the agreement reasonable will approve it. The Commission shall also direct its Staff to file monthly reports as indicated in the agreement. Lastly, the Commission shall direct its Staff to file a complaint if it finds that the operational funds of Mill Creek are being misused.

IT IS THEREFORE ORDERED:

1. That the following tariff sheet, filed by Mill Creek Sewer, Inc., and assigned Tariff No. YS-2005-0330, is approved for service rendered on or after October 12, 2005:

P.S.C. MO No. 1

3rd Revised Sheet No. 4, replacing 2nd Revised Sheet No. 4

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2. That the Agreement Regarding Disposition of Small Company Rate Increase Request, including the two supplements, is approved.
3. That all parties to the Agreement, including the supplements, are directed to comply with its terms.
4. That the Staff of the Commission shall file monthly reports as indicated in the Agreement.
5. That the Staff of the Commission shall file a complaint if it finds that the operational funds of Mill Creek Sewers, Inc., are being misused.
6. That this order shall become effective on October 9, 2005.

Davis, Chm., Murray, and Appling, CC.,
concur.

Gaw and Clayton, CC., dissent, with
joint dissenting opinion to follow.

Jones, Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONERS STEVE GAW AND ROBERT M. CLAYTON III

In its Order Approving Tariff and Agreement, the majority grants a rate increase to Mill Creek Sewers, Inc. We recognize the need for periodic rate increases for Missouri regulated utilities and, given the level of current rates as well as the length of time since the last rate increase, we normally would not have had a problem with the stipulated rate increase. That said, however, the record is replete with evidence, as the majority's decision recognizes, that Mill Creek's management / ownership has been unwilling or incapable of providing safe and adequate service.¹ The evidence reflects that the Missouri Department of Natural Resources (MO DNR) has sought and received numerous judgments against this utility for violations of environmental regulations. Furthermore, the MO DNR disclosed that they are in the process of pursuing alleged violations occurring this year. As a result, large penalties have been imposed upon the utility as well as individually against its owner. Against this background of inadequate utility service, we are opposed to any rate increase so long as a new owner or receiver is not in place.

This past year, the General Assembly enacted SB 462 which provides the Commission with the authority to appoint an interim receiver upon a finding that a water / sewer utility is "unable or unwilling to provide safe and adequate service". The record clearly demonstrates that, for the past decade, Mill Creek's management has been unwilling or unable to provide such a basic level of sewer service. Given the availability of this new statutory grant of authority, we find it difficult to vote

¹ In its Order, the majority specifically notes that customer complaints range from "damaged real property and sewage backup to the lack of customer service and customers having to repair the sewage system because the owner was either unwilling or unable to do so."

for a rate increase prior to the installment of an interim receiver. The parties have attempted to impose conditions that will ensure that the rate increase will be used to improve the quality of the sewer service. The current owner stated that he is agreeable for the company that has been physically running the system this summer to take over the financial operation. However, there is no contract to do so before the Commission, no guarantee that a contract will be executed, and no way to insure that the current owner will not unilaterally rescind such a contract under this order. We can not agree to a rate increase so long as Mill Creek's current owner remains even tangentially involved in the utility's operation. Until such time as he divests himself of his interest in the utility or the Commission appoints an interim receiver to operate the Company, we must dissent from any rate increase.

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In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules.*

*Case No. GR-2005-0284
Decided September 30, 2005*

Gas §18. Laclede Gas Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for gas service provided to retail customers in its Missouri area. After rejecting the initial tariff, the Commission approved a rate increase agreed to by all of the parties.

Gas §19. Laclede would receive an estimated \$8.5 million in new revenues contemplated by the settlement. The Commission agreed with Laclede and held that rate increases are necessary from time to time to ensure that the utilities have the cash flow to maintain safe and adequate service.

Rates §108. Laclede Gas Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for gas service provided to retail customers in its Missouri area. After rejecting the initial tariff, the Commission approved a rate increase agreed to by all of the parties.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND ORDER APPROVING TARIFFS**

Syllabus: This order approves the Stipulation and Agreement and approves the tariffs filed in order to implement the terms of that agreement.

On February 18, 2005, Laclede Gas Company submitted to the Commission proposed tariff sheets (YG-2005-0653) intended to implement a general rate increase for gas service provided to retail customers in its Missouri service area. The proposed tariff sheets bore a requested effective date of March 21, 2005. The proposed tariff sheets were designed to produce an annual increase of approximately \$39 million in the Company's revenues including approximately \$5 million for the Company's Infrastructure System Replacement Surcharge (ISRS). On February 28, 2005, the Commission suspended the Company's proposed tariff sheets for 120 days plus six months, until January 19, 2006. Along with its proposed tariff sheets, Laclede submitted supporting Direct Testimony.

On March 22, 2005, the Commission granted the unopposed applications to intervene of the Missouri Energy Group,¹ the Paper, Allied-Industrial, Chemical, and Energy Workers Local No. 5-6, AFL-CIO, and the Missouri Industrial Energy Consumers (MIEC).² The Commission also granted the unopposed application to intervene of the Missouri Department of Natural Resources.

* This order contains changes from a notice of correction issued on October 25, 2005.

¹ The Missouri Energy Group is comprised of: Barnes-Jewish Hospital, Emerson Electric Company, SSM HealthCare, and St. John's Mercy Health Care.

² The Missouri Industrial Energy Consumers are: Anheuser-Busch Companies, Inc., The Boeing Company, DaimlerChrysler, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, J.W. Aluminum, Monsanto Company, Pfizer, Precoat Metals, Procter & Gamble Manufacturing, Nestlé Purina, and Solutia.

The Commission held two local public hearings in the St. Louis area on August 24, 2005, to receive public comment on the proposed tariffs.

On August 31, 2005, the Staff of the Missouri Public Service Commission, Laclede, the Office of the Public Counsel, DNR, and MIEC filed a Stipulation and Agreement. No objections to the agreement were filed. A copy of the Stipulation and Agreement is attached to this order as Attachment A. As part of the agreement, Laclede submitted additional tariff sheets (YG-2006-0156) designed to implement the provisions of the agreement. Those tariff sheets bear an effective date of October 1, 2005. On September 9, 2005, Staff filed affidavits in support of the agreement.

The Commission held two additional local public hearings in the St. Louis area on September 19, 2005, to receive public comment on the terms of the agreement. The record from all four public hearings reflects that much of the public testimony focused on the fact that many low-income households are finding it difficult, if not impossible, to afford natural gas as a source of heat.

On September 26, 2005, the Commission convened a hearing in its offices in Jefferson City in order to review the terms of the agreement with the parties. All parties except the Missouri Energy Group were represented at the hearing.

The signatory parties agreed that the Stipulation and Agreement resolves all issues in this case. The parties further agreed that all of the prepared testimony and Staff's Affidavits could be received into the record. The Commission received the Stipulation, Laclede's Direct Testimony, and Staff's Affidavits as evidence at the stipulation hearing.

In addition, Staff filed Post-Hearing Exhibit 4. No objections to that exhibit were filed and the Commission admits it into the record.

Commission rule 4 CSR 240-2.115(1) provides that if no party requests a hearing, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement. No party has requested a hearing regarding any issue and therefore, the Stipulation and Agreement will be treated as a unanimous stipulation and agreement.

The agreement provides that:

Laclede shall be authorized to file revised tariff sheets containing new rate schedules for natural gas service. Such schedules are designed to: (a) produce an incremental annual increase in Laclede's non-gas, Missouri jurisdictional revenues of Ten Million, Five Hundred Thousand Dollars (\$10,500,000), which includes Six Million, One Hundred Twenty Six Thousand Dollars (\$6,126,000) in Infrastructure System Replacement Surcharges that have previously been authorized by the Commission and are already in effect; and (b) reflect in Laclede's Purchased Gas Adjustment/Actual Cost Adjustment mechanism and remove from its non-gas cost of service Four Million, One Hundred Forty Thousand Dollars (\$4,140,000) in costs related to its financing of certain gas storage inventories. Revenue amounts referenced in this paragraph are exclusive of any applicable license, occupation,

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franchise, gross receipts taxes or other similar tax or taxes. The Parties further agree that such revenue requirement shall be allocated to the Company's various customer classes in accordance and consistent with the customer billing determinants set forth in Attachment 1 to this Stipulation and Agreement, and in accordance with the tariff sheets set forth in Attachment 2 to this Stipulation and Agreement, which are incorporated herein for all purposes.

The parties further agree that the rates set out in the sample tariff sheets attached to the agreement are just and reasonable. The stipulation and agreement contains numerous other provisions to resolve disputed issues between the parties, including a provision whereby the parties agree that Laclede's proposed tariffs should go into effect on October 1, 2005, or as soon thereafter as practical. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.³ In reviewing the agreement, the Commission notes that⁴

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.⁵ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

DISCUSSION:

This case illustrates one of the most important public policy questions faced by this Commission: what is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers, especially those with fixed or low incomes, and ensuring that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have **the opportunity** to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure.⁶ Both of these objectives are statutory duties of this commission.

³Section 536.060, RSMo Supp. 2004.

⁴Section 536.090, RSMo Supp. 2004. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

⁵ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

⁶ See generally, Section 386.610, RSMo 2000.

In this case, the record reflects that Laclede has not received an increase in rates for operational costs since 2002 and that the request filed by Laclede in January requested approximately \$39 million in increased rates. Furthermore, the record shows that Laclede “has experienced approximate increases in net utility investments of \$90 million and operating expenses of \$16 million since the last rate increase in 2002.”⁷ This Commission also takes notice of the fact that futures contracts for wholesale natural gas are currently trading at or near record levels and these costs must eventually be passed through to ratepayers.

The record further reflects that the proposed settlement in this case would reduce Laclede’s original request by approximately 75 percent. The estimated \$8.5 million in new revenues contemplated by the settlement would result in the average residential bill increasing approximately one percent or \$1.05 per month for the average residential ratepayer. This is no trivial amount of money when considering the negative impact that high natural gas prices could have on the economy and on Laclede’s customers.

Based on the agreement of the parties, the testimony received at the local public hearings in St. Louis, and the testimony received at the evidentiary hearing in Jefferson City, the Commission finds that the parties reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service, which is in the interest of the public welfare. Accordingly, the revisions set out in the tariff sheets attached to the Stipulation and Agreement are just and reasonable and shall be approved as set out below.

IT IS THEREFORE ORDERED:

1. That Post-Hearing Exhibit 4 filed by the Staff of the Missouri Public Service Commission is admitted.
2. That the Stipulation and Agreement filed on August 31, 2005, is hereby approved as a resolution of all issues in this case (See Attachment A).
3. That Laclede Gas Company is ordered to comply with the terms of the Stipulation and Agreement.
4. That the proposed gas service tariff sheets (YG-2005-0653) submitted on February 18, 2005, by Laclede Gas Company for the purpose of increasing rates for gas service to retail customers are hereby rejected.
5. That the proposed gas service tariff sheets (YG-2006-0156) as submitted on August 31, 2006, as part of the Stipulation and Agreement, are hereby approved for natural gas service to be rendered on or after October 1, 2005. The tariff sheets approved are:

P.S.C. MO. NO. 5 Consolidated

Fifteenth Revised Sheet No. 2, CANCELLING Fourteenth Revised Sheet No. 2

Eleventh Revised Sheet No. 3, CANCELLING Tenth Revised Sheet No. 3

First Revised Sheet No. 3-a, CANCELLING Original Sheet No. 3-a

First Revised Sheet No. 3-b, CANCELLING Original Sheet No. 3-b

Fourteenth Revised Sheet No. 4, CANCELLING Thirteenth Revised Sheet No. 4

Third Revised Sheet No. 4-a, CANCELLING Second Revised Sheet No. 4-a

⁷ Affidavit of Stephen M. Rackers, filed Sept. 9, 2005, p. 3.

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Fifteenth Revised Sheet No. 5, CANCELLING Fourteenth Revised Sheet No. 5
 Fourteenth Revised Sheet No. 7, CANCELLING Thirteenth Revised Sheet No. 7
 Sixteenth Revised Sheet No. 8, CANCELLING Fifteenth Revised Sheet No. 8
 Fourteenth Revised Sheet No. 9, CANCELLING Thirteenth Revised Sheet No. 9
 Ninth Revised Sheet No. 11, CANCELLING Eighth Revised Sheet No. 11
 Fifth Revised Sheet No. 12, CANCELLING Fourth Revised Sheet No. 12
 Ninth Revised Sheet No. 15, CANCELLING Eighth Revised Sheet No. 15
 Eighth Revised Sheet No. 17, CANCELLING Seventh Revised Sheet No. 17
 Twelfth Revised Sheet No. 18, CANCELLING Eleventh Revised Sheet No. 18
 First Revised Sheet No. 18-b, CANCELLING Original Sheet No. 18-b
 First Revised Sheet No. 18-c, CANCELLING Original Sheet No. 18-c
 Eighth Revised Sheet No. 19, CANCELLING Seventh Revised Sheet No. 19
 Seventh Revised Sheet No. 20, CANCELLING Sixth Revised Sheet No. 20
 Twelfth Revised Sheet No. 21, CANCELLING Eleventh Revised Sheet No. 21
 Fourteenth Revised Sheet No. 22, CANCELLING Thirteenth Revised Sheet No. 22
 Seventh Revised Sheet No. 23, CANCELLING Sixth Revised Sheet No. 23
 Fifth Revised Sheet No. 24, CANCELLING Fourth Revised Sheet No. 24
 Fourth Revised Sheet No. 25, CANCELLING Third Revised Sheet No. 25
 Fourth Revised Sheet No. 26, CANCELLING Third Revised Sheet No. 26
 Fourth Revised Sheet No. 27, CANCELLING Third Revised Sheet No. 27
 Fourth Revised Sheet No. 28, CANCELLING Third Revised Sheet No. 28
 Fifth Revised Sheet No. 28-a, CANCELLING Fourth Revised Sheet No. 28-a
 Third Revised Sheet No. 28-b, CANCELLING Second Revised Sheet No. 28-b
 First Revised Sheet No. 28-b.1, CANCELLING Original Sheet No. 28-b.1
 First Revised Sheet No. 28-b.2, CANCELLING Original Sheet No. 28-b.2
 First Revised Sheet No. 28-b.3, CANCELLING Original Sheet No. 28-b.3
 Third Revised Sheet No. 28-c, CANCELLING Second Revised Sheet No. 28-c
 Third Revised Sheet No. 28-c.1, CANCELLING Second Revised Sheet No. 28-c.1
 Fifth Revised Sheet No. 28-e, CANCELLING Fourth Revised Sheet No. 28-e
 First Revised Sheet No. 28-f, CANCELLING Original Sheet No. 28-f
 Third Revised Sheet No. 28-g, CANCELLING Second Revised Sheet No. 28-g
 Original Sheet No. 28-h, CANCELLING All Previous Schedules
 Two Hundred and Sixth Revised Sheet No. 29, CANCELLING Two Hundred and
 Fifth Revised Sheet No. 29
 Tenth Revised Sheet No. 31, CANCELLING Ninth Revised Sheet No. 31
 Tenth Revised Sheet No. 34, CANCELLING Ninth Revised Sheet No. 34
 First Revised Sheet No. 36, CANCELLING Original Sheet No. 36
 Fourth Revised Sheet No. R-3, CANCELLING Third Revised Sheet No. R-3
 Third Revised Sheet No. R-5, CANCELLING Second Revised Sheet No. R-5
 Fourth Revised Sheet No. R-5-a, CANCELLING Third Revised Sheet No. R-5-a
 Second Revised Sheet No. R-5-b, CANCELLING First Revised Sheet No. R-5-b
 First Revised Sheet No. R-5-d, CANCELLING Original Sheet No. R-5-d
 First Revised Sheet No. R-12-a, CANCELLING Original Sheet No. R-12-a
 Second Revised Sheet No. R-43, CANCELLING First Revised Sheet No. R-43
 First Revised Sheet No. R-44, CANCELLING Original Sheet No. R-44

6. That this order shall become effective on October 1, 2005.
7. That this case shall close on October 2, 2005.

Davis, Chm., Murray, and Appling, CC., concur.
Clayton, C., dissents. Gaw, C., dissents with separate
dissenting opinion to follow.

Dippell, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I respectfully dissent from the majority's Order Approving Stipulation and Agreement and Order Approving Tariffs. As noted in that Order, the majority approves a settlement to increase Laclede Gas Company's (Laclede) natural gas rates by \$10.5 million for service on and after October 1, 2005. As stated in the majority's decision, Laclede's original tariff sheets bore a requested effective date of March 21, 2005.¹

It is well known that the wholesale price of natural gas has approximately doubled in the last two years. In fact, the price is 4 to 5 times higher than it was in the fall of 2001. Recognizing that wholesale gas costs are passed on to customers through the Purchased Gas Adjustment (PGA) Clause, the increase approved by the majority will be in addition to any increase experienced in the PGA Clause. Recent data indicates that many low income households have been faced with foregoing food, clothing and medicine in an effort to make their natural gas payments. This crisis will only be intensified this winter by the tremendous increases in natural gas realized as a result of a tight supply / demand correlation as well as the effect of Hurricanes Katrina and Rita. The non-gas rate increase approved by the majority, while not large compared to the amount originally sought, will cause further financial problems for low and middle income households already struggling to pay for increasing costs in gasoline.

Additionally, this increase expedites the date by which the Company is allowed to implement the rate increase. As noted previously, Laclede's original rate increase would not have been effective until January 19, 2006. By approving this settlement, Laclede is allowed to implement the agreed upon rates approximately 3 1/2 months prior to its original proposal and in advance of the winter heating season. I find it difficult to support an order implementing the increase at the beginning of this difficult heating season.

¹ The effective date of the tariffs was subsequently suspended by the Commission until January 19, 2006. See, *Suspension Order and Notice*, Case No. GR-2005-0284, issued February 28, 2005.

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Finally, I recognize that the approved settlement also provides for the use of the accrual method for the recovery of net salvage for mass property accounts. As I have indicated in a previous dissent, I am concerned about the use of the accrual method and its attendant estimates to recover costs of removal that are uncertain and that may never actually be incurred.² I continue to harbor concerns that ratepayers be expected to front the utility for these future unknown expenditures.

For the above stated reasons, I must dissent.

² See, *In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules*, Case No. GR-99-315, Dissenting Opinion dated January 18, 2005.

**In the Matter of CenturyTel of Missouri, LLC's Request for
Competitive Classification Pursuant to Section 392.245.5,
RSMo (2005).**

*Case No. IO-2006-0109
Decided October 4, 2005*

Telecommunications §40. The controlling statute - 392.245, RSMo - requires that an incumbent local exchange company's services be classified as competitive in any exchange in which two other non-affiliated carriers are providing basic local telecommunications services within that exchange. Separate determinations are made for business and residential services.

Telecommunications §40. The controlling statute - 392.245, RSMo - provides that an exchange is competitive in which two or more facilities-based wireline carriers are providing services to customers, of in which one facilities-based wireline carrier and one wireless carrier are providing services.

Telecommunications §40. When the explicit requirements of the controlling statute - 392.245, RSMo - are met, there is competition and the exchange must be classified as competitive. There is no room for further interpretation regarding whether that competition is effective.

Appearances

Larry W. Dority, Fischer & Dority, P.C., 101 Madison, Suite 400, Jefferson City, Missouri 65101, for CenturyTel of Missouri, LLC.

Jason L. Ross, Greensfelder, Hemker & Gale, P.C., 10 South Broadway, Suite 2000, St. Louis, Missouri 63102, for Fidelity Communication Services II, Inc.

Leland B. Curtis, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 S. Bemiston, Suite 200, Clayton, Missouri 63105, for Socket Telecom, LLC.

William D. Steinmeier, William D. Steinmeier, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110-4595, for Alltel Communications, Inc.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

David A. Meyer, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants CenturyTel of Missouri, LLC's request for competitive classification pursuant to Section 392.245.5, RSMo (2005), for residential services, other than exchange access service, for the Dardenne, O'Fallon, St. Peters, and Wentzville

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exchanges. The Commission also grants competitive classification for business services, other than exchange access service, in the Bourbon, Columbia, Cuba, O'Fallon, St. James, St. Peters, and Wentzville exchanges. In addition, the Commission approves the tariff revisions filed to implement these classifications.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On September 9, 2005, CenturyTel of Missouri, LLC filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. In its application, CenturyTel requested that the Commission classify as competitive its residential services, other than exchange access service, in the Bourbon, Branson, Columbia, Dardenne, O'Fallon, St. Peters, and Wentzville exchanges. CenturyTel also requested competitive classification for its business services, other than exchange access service, in the Bourbon, Columbia, Cuba, Dardenne, O'Fallon, St. James, St. Peters, and Wentzville exchanges. Concurrent with the filing of its application, CenturyTel filed proposed tariffs to become effective on October 9, reflecting the requested competitive classifications.

In an order issued September 12, the Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than September 16. The Commission also ordered the Staff of the Commission to file a recommendation and ordered that any objections to CenturyTel's application be filed no later than September 20. In addition, the Commission scheduled an evidentiary hearing for September 27.

On September 14, Fidelity Communication Services II, Inc., filed an Application to Intervene. The Commission granted Fidelity's intervention request on September 19. No other requests for intervention were filed.

On September 20, Fidelity filed an objection to the portion of CenturyTel's application seeking competitive classification of residential and business services in the Bourbon exchange. On the same date, the Office of the Public Counsel filed a general objection to CenturyTel's application and requested that CenturyTel be required to prove that it has met the requirements of the controlling statute before it is granted competitive classification in any of its exchanges.

Staff also filed its recommendation on September 20. Staff indicated that it had not yet completed its investigation but at that time could not confirm the existence of a wireline competitor providing local voice service to residential customers in the Bourbon, Branson, or Columbia exchanges. Similarly, Staff was unable to confirm the existence of a wireline competitor providing local voice service to business customers in the Dardenne exchange. Staff recommended that CenturyTel's

application be denied for those exchanges in which Staff could not confirm the presence of a wireline competitor but recommended that CenturyTel's application be granted for the other requested exchanges.

On September 20, witnesses on behalf of CenturyTel, Fidelity, and Staff prefiled direct testimony supporting the positions of those parties. Those same parties submitted prehearing briefs on September 23.

As a result of the information exchanged in the testimony and briefs, CenturyTel, Staff and Public Counsel were able to offer a joint recommendation on September 23 in which they indicated their agreement on the exchanges for which competitive status was appropriate under the controlling statute. Those three parties agreed that CenturyTel's residential services, other than exchange access services, should be classified as competitive in the Dardenne, O'Fallon, St. Peters, and Wentzville exchanges. They also agreed that CenturyTel's business services, other than exchange access services, should be classified as competitive in the Bourbon, Columbia, Cuba, O'Fallon, St. James, St. Peters, and Wentzville exchanges. In joining in that joint recommendation, CenturyTel indicated its agreement to withdraw its request for competitive status for residential service in the Bourbon, Branson, and Columbia exchanges and for business services in the Dardenne exchange. Fidelity did not join in the joint recommendation of CenturyTel, Staff, and Public Counsel, differing from those three parties only in opposing competitive classification for CenturyTel's business services in the Bourbon exchange.

In an effort to obtain more information, on September 22, the Commission issued an order joining several additional wireless and competitive local exchange telephone companies as parties to this case.¹ Those additional parties and Fidelity, which were the competitors that CenturyTel had identified as operating in the exchanges for which it requested competitive classification, were ordered to file a verified pleading by September 26, indicating for each exchange under consideration whether it has at least two residential customers and two business customers whose addresses are located within that exchange. Responsive pleadings were filed by T-Mobile USA, Inc.; Verizon Wireless; Sprint Spectrum L.P., d/b/a Sprint PCS and Nextel West Corp.; Charter Fiberlink-Missouri, LLC; United States Cellular Corporation; CD Telecommunications, LLC, Socket Telecom, LLC; and Alltel Communications, Inc.

The pleading from Verizon was admitted into evidence without objection at the hearing.² In addition, the presiding officer announced at the hearing that the Commission would take administrative notice of the pleadings filed by CD Telecommunications, LLC and Alltel Communications, Inc.³ The other responses

¹ The following parties were joined: Charter Fiberlink – Missouri, LLC; Socket Telecom, LLC; CD Telecommunications, LLC; Cingular; Verizon; T-Mobile; Alltel; US Cellular; Nextel; and Sprint PCS.

² Transcript, page 65, lines 17-23. After completion of the hearing, Verizon submitted an amended affidavit providing additional information about the customers it serves in the exchanges at issue. Fidelity objected to the admission of that amended document in a pleading filed September 30.

³ Transcript, page 97, lines 2-10.

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were filed after the conclusion of the hearing. On September 30, CenturyTel filed a pleading indicating that it did not object to the Commission's consideration of those post-hearing pleadings. On the same date, Fidelity filed an objection to the Commission's consideration of those pleadings.

The Commission held an evidentiary hearing on September 27. Staff, CenturyTel Fidelity, and Public Counsel were represented at the hearing. In addition, Socket Telecom, LLC; and Alltel Communications, Inc. participated in the hearing. Staff submitted a post-hearing exhibit that was marked as number 9. Fidelity submitted post-hearing exhibit number 11. The other parties were directed to file any objections they might have to the admission of those exhibits by September 30. No objections were filed and those exhibits are admitted into evidence. The parties were allowed to give closing arguments in lieu of post-hearing briefs.

Overview

CenturyTel is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020. CenturyTel is a large incumbent local exchange carrier (ILEC) that became subject to price cap regulation under Section 392.245.

Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten-day notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.⁴

On July 14, 2005, Senate Bill No. 237⁵ (S.B. 237) was signed into law and became effective August 28, 2005. S.B. 237 changed the process under the price cap statute⁶ for determining whether the business and residential services of a price cap regulated ILEC should be classified as competitive in an exchange.

Before S.B. 237, the Commission was required to determine that "effective competition" existed for the requested services in the designated exchanges before classifying those services as competitive. Under this "effective competition" standard, the Commission reviewed, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

Under S.B. 237, however, the Commission no longer determines whether "effective competition" exists. Rather, S.B. 237 focuses on the number of carriers

⁴ Van Eschen Direct, Exhibit 7, page 3, lines 10-18.

⁵ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). (The relevant portions of the law will be codified at Section 392.245, RSMo 2005. All further references to the statute will be to the statute as amended by S.B. 237, unless otherwise noted.)

⁶ Section 392.245, RSMo 2000.

providing “basic local telecommunications service” within an exchange. The Commission must classify the ILEC’s services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.⁷ Separate determinations are made concerning business and residential services. Thus an exchange could be competitive for residential services but not for business, or for business but not residential services.

The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁸ The other entity that can be counted as providing basic local telecommunications services is one that provides “local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest.”⁹ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services.

CenturyTel’s application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for residential services in seven exchanges. The application alleges that CenturyTel faces competition from one wireless and one facilities-based wireline carrier for business services in eight exchanges. Subsequently, CenturyTel withdrew its request for competitive classification for residential services in three exchanges and for business services in one exchange. That means that CenturyTel is still seeking competitive classification for residential services in four exchanges and for business services in seven exchanges. The Commission will consider each exchange in turn.

Residential Services

Dardenne, O’Fallon, St. Peters, and Wentzville Exchanges

The statute provides that one of the competing carriers in an exchange can be a wireless carrier. Arthur Martinez, Director of Government Relations for CenturyTel, testified that one or more of six wireless carriers provide local service to residential customers in each of the exchanges for which CenturyTel is seeking competitive classification for residential services.¹⁰ Staff’s witness, John Van Eschen, manager of the Commission’s telecommunications department, testified that an FCC report shows that all areas of Missouri are served by at least one commercial mobile service provider.¹¹ At the hearing, Van Eschen testified that for these four exchanges, at least one wireless provider has local numbers assigned to them, or is providing service through an EAS route.¹² That is important because it means

⁷ Section 392.245.5, RSMo.

⁸ Section 392.245.5(1), RSMo.

⁹ Section 392.245.5(2), RSMo.

¹⁰ The wireless carriers identified by CenturyTel are: Cingular, Verizon, T-Mobile, Alltel, US Cellular, Nextel, and Sprint.

¹¹ Van Eschen Direct, Exhibit 7, page 6, lines 20-22.

¹² Transcript, page 20, lines 1-21.

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that a call from a wireline phone to a wireless number would be made as a local call for the wireline customer. No party disputed CenturyTel's assertion that at least one wireless carrier was competing in each of these exchanges.

The other competing carrier must be a facilities-based wireline carrier. For these four exchanges, CenturyTel identified Charter Fiberlink-Missouri as the competing carrier.¹³ Staff confirmed that Charter Fiberlink-Missouri provides service over more than 1,200 lines in each of those exchanges.¹⁴ Again, no party disputed CenturyTel's assertion that it faced competition for residential services from a facilities-based wireline carrier in those exchanges.

Business Services

Columbia, Cuba, O'Fallon, St. James, St. Peters, and Wentzville Exchanges

The requirements for a finding of a competitive presence in an exchange are the same for business services as they are for residential services. Again, CenturyTel asserts that at least one wireless carrier is providing services to business customers in each of these exchanges. At the hearing, Staff confirmed that for these exchanges, at least one wireless provider has local numbers assigned to it.¹⁵ No party disputed CenturyTel's assertion that it faced competition for business services from at least one wireless carrier in each of these exchanges.

CenturyTel asserts that it faces wireline competition for business services in these exchanges from several companies. For the O'Fallon, St. Peters, and Wentzville exchanges, CenturyTel claims that competition is provided by AT&T. Staff confirms that AT&T offers business services over multiple lines in each of those exchanges.¹⁶ For the Columbia exchange, CenturyTel claims that competition is provided by Socket Telecom.¹⁷ Staff confirmed that Socket, as well as AT&T, provide business services over multiple lines in Columbia.¹⁸ Socket's presence in Columbia was confirmed by Socket's witness Matt Kohly.¹⁹ For the Cuba and St. James exchanges, CenturyTel asserts that wireline competition is offered by Fidelity.²⁰ Staff confirmed that Fidelity is offering business services on multiple lines, to multiple customers in those two exchanges.²¹ Fidelity also confirmed that it is offering business services in those two exchanges.²² No party disputed CenturyTel's assertion that it faces competition for business services from at least one wireline carrier in each of these exchanges.

¹³ Martinez Direct, Exhibit 1, page 8, lines 12-14.

¹⁴ Transcript, page 14, lines 4-6.

¹⁵ Transcript, page 20, lines 1-21.

¹⁶ Exhibit 9HC.

¹⁷ Martinez Direct, Exhibit 1, page 11, lines 19-20.

¹⁸ Transcript, page 11, lines 12-17.

¹⁹ Transcript, page 49, lines 6-12.

²⁰ Martinez Direct, Exhibit 1, page 10, lines 6-8.

²¹ Transcript, page 16, lines 16-18, page 17, lines 11-14.

²² Transcript, pages 90-91, lines 19-25, 1-14.

Bourbon Exchange

This is the only exchange in which there is a dispute between the parties. CenturyTel asserts that it faces wireline competition in the Bourbon exchange from Fidelity for business services.²³ Staff confirmed that Fidelity is providing business services in Bourbon over 32 lines.²⁴ Fidelity does not disagree that it is providing business services in Bourbon over 32 lines. It does, however, argue that the services it is offering to a limited number of customers do not constitute real competition for CenturyTel.

Fidelity explains that it provides business services to only two customers in the Bourbon exchange. It provides those services over a fiber loop owned by an unaffiliated broadband provider, using a switch owned by one of its affiliates. To serve additional customers in the Bourbon exchange, Fidelity would have to either, build its own facilities in Bourbon, lease facilities from CenturyTel, ask the provider of the fiber loop that it is currently leasing to extend its facilities, or lease additional facilities, if any exist, from a different third party.²⁵ Fidelity does not advertise for new business customers in Bourbon.²⁶ Fidelity contends that this minimal level of competition does not constitute providing service within the meaning of the controlling statute.

Aside from the business services offered by Fidelity, CenturyTel contends that it faces competition in the Bourbon exchange from wireless service providers. Staff reported that Cingular, Sprint, T-Mobile, and Verizon are authorized to provide wireless service in the Bourbon exchange.²⁷ In particular, Verizon Wireless confirmed that it has both coverage and network facilities in the Bourbon exchange.²⁸ However, unlike the other exchanges that it examined, Staff's review of wireless carriers in the Bourbon exchange did not reveal the presence of at least one wireless provider having a local number assigned within the Bourbon exchange.²⁹

Assignment of a local number is not the only means by which a wireless carrier could provide a local number for a customer in an exchange. A CenturyTel customer in the Bourbon exchange, or any other exchange, could port their number to a wireless provider and in that way, calls to or from that customer would be rated as local calls.³⁰ However, CenturyTel was not aware of any CenturyTel numbers being ported to a wireless carrier for a customer located in the Bourbon exchange.³¹

²³ Martinez Direct, Exhibit 1, page 10, lines 6-8.

²⁴ Transcript, page 15, lines 7-8.

²⁵ Beier Direct, Exhibit 10, pages 3-4, lines 64-78.

²⁶ Transcript, page 29, lines 6-13.

²⁷ Transcript, page 21, lines 5-8. See *a/so*, Exhibit 2.

²⁸ Exhibit 6.

²⁹ Transcript, page 21, lines 2-15.

³⁰ Transcript, page 59, lines 20-23.

³¹ Transcript, page 61, lines 21-25.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo, as amended in 2005 by SB 237, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

CenturyTel is an incumbent local exchange telecommunications company and has requested competitive classification of its business or residential services in several exchanges.

Section 392.245.5, RSMo, as amended in 2005 by SB 237, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."³² The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.³³

³² Section 392.245.5(1).

³³ Section 392.245.5(2).

S.B. 237 defines "local voice service" as meaning "[r]egardless of the technology used . . . two way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo."³⁴

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."³⁵

CenturyTel is asserting that its services in various exchanges should be classified as competitive. As the party asserting the positive of a proposition, CenturyTel has the burden of proving that proposition.³⁶

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions.

Residential Services

Dardenne, O'Fallon, St. Peters, and Wentzville Exchanges

The undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated entity providing "local voice" service in whole or in part over facilities in which it or one of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that CenturyTel's application for competitive classification of its residential services, other than exchange access services, in these exchanges should be granted.

Business Services

Columbia, Cuba, O'Fallon, St. James, St. Peters, and Wentzville Exchanges

The undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated entity providing "local voice" service in whole or in part over facilities in which it or one of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that CenturyTel's application for competitive classification of its business services, other than exchange access services, in these exchanges should be granted.

³⁴ Section 392.245.5(3).

³⁵ Section 386.020(52).

³⁶ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994)

Bourbon Exchange

The undisputed evidence establishes that Fidelity is providing business services to two customers in the Bourbon exchange over multiple lines, using its own facilities. Furthermore, the evidence establishes that one or more wireless carriers, including Verizon, are offering their services to customers in the Bourbon exchange. Therefore the explicit requirements of the controlling statute are satisfied, and the business services, other than exchange access service, that CenturyTel offers in the Bourbon exchange must be classified as competitive.

Fidelity would find an implicit provision in the statute requiring the Commission to find that there is effective competition in the exchange before classifying CenturyTel's services as competitive. Unfortunately for Fidelity's argument, the statute contains no such provision. Indeed, it is clear that in enacting SB 237, the general assembly intended to make the determination of when there is effective competition in an exchange quite simple. When the explicit requirements of the statute are met, there is competition. There is no room for further interpretation.

CenturyTel has established that the criteria set by the general assembly have been met. CenturyTel's business services, other than exchange access service, must be classified as competitive in the Bourbon exchange.

As required by the statute, CenturyTel submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of October 9. On September 30, CenturyTel submitted substitute sheets to reflect the agreed upon list of exchanges and services that are to be classified as competitive. Since the submitted tariff, as amended, corresponds with the Commission's decision, that tariff will be approved.

IT IS THEREFORE ORDERED:

1. That post-hearing exhibit number 9 is admitted into evidence.
2. That post-hearing exhibit number 11 is admitted into evidence.
3. That CenturyTel of Missouri, LLC's residential services, other than exchange access service, are classified as competitive in the Dardenne, O'Fallon, St. Peters, and Wentzville exchanges.
4. That CenturyTel of Missouri, LLC's business services, other than exchange access services, are classified as competitive in the Columbia, Cuba, O'Fallon, St. James, St. Peters, and Wentzville exchanges.
5. That CenturyTel of Missouri, LLC's business services, other than exchange access services, are classified as competitive in the Bourbon exchange.
6. That CenturyTel of Missouri, LLC's proposed tariff revisions (Tracking Nos. JI 2006 0186, JI-2006-0187, JI-2006-0188, JI-2006-0189, JI-2006-0190 and JI-2006-0191) filed on September 9, 2005, as substituted on September 30, 2005, are approved to become effective for service on or after October 9, 2005.
7. That all other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.
8. That this Report and Order shall become effective October 9, 2005.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC.,
concur and certify compliance with the provisions
of Section 536.080, RSMo 2000.

**CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY AND
CHAIRMAN JEFF DAVIS**

In its October 4, 2005 Order, the Commission approved CenturyTel of Missouri, LLC's ("CenturyTel") request for competitive classification in certain of its exchanges pursuant to § 392.245.5, RSMo.¹ While I voted in favor of the Order because I believe that CenturyTel provided ample evidence to support this conclusion, I write separately to note that certain language within the order was unnecessary and misleading.

In order to qualify for competitive classification in exchanges with business or residential customers, Section 392.245.5 requires:

"Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange."²

The statute goes on to add that in each exchange, a non-affiliated wireless provider "shall be considered as an entity providing basic local telecommunications service" within an exchange, as long as only one such wireless provider is counted.³ Therefore, if an exchange for which a carrier requests competitive classification has one wireline provider⁴ and one wireless provider, the exchange must be declared competitive.

The Order in this case conducts a brief discussion about number porting and the availability of local numbers for customers of wireless providers in CenturyTel's markets. This discussion indicates to the reader that these issues are to be taken under consideration by the decision maker to determine whether a wireless provider can be counted as competition under the statute. Nothing in §392.245.5 requires a wireless company to provide local numbers in the incumbent's exchange or port a wireline company's local exchange number in order to provide toll-free calling. The statute simply states that wireless companies "shall be considered as entities providing basic local telecommunications service". In other words, wireless companies are "deemed" to be providing such service.

¹ Section 392.245, RSMo was amended by Senate Bill 237 (2005), to provide new standards for a finding of competitive classification.

² The same requirements apply to service offered to business customers.

³ See, §392.245.5(1), RSMo.

⁴ There are additional requirements for a wireline provider, not applicable to wireless providers, to be counted as competition in §392.245.5, but these are not relevant to the discussion.

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In my opinion, the discussion in the Order is irrelevant to the decision and can only be viewed as “dicta”. The Commission should refrain from adding language that could create confusion about whether we will be requiring more than is legally necessary to qualify for competitive classification.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

Through its Report and Order issued in the above-captioned docket, the Commission has granted competitive classification for residential services provided by CenturyTel in the Dardenne, O’Fallon, St. Peters and Wentzville exchanges as well as business services in the Bourbon, Columbia, Cuba, O’Fallon, St. James, St. Peters, and Wentzville exchanges. By this concurring opinion, I express my agreement with the majority decision for all exchanges except for business services in the Bourbon exchange.

The evidence indicates, and the majority reports, that wireline service to business customers in the Bourbon exchange is provided by Fidelity Communications. However, the evidence also reveals that Fidelity does not hold itself out as a competitor for all business customers. Instead, Fidelity is providing service to only two business customers capable of being served through a fiber loop leased from an unaffiliated broadband provider. As Fidelity notes, in order for it to provide service to additional customers, it would have to build out or lease additional facilities from a different third party. Furthermore, Fidelity does not advertise for new business customers in Bourbon. As such, no competitive pressure exists from Fidelity for business customers in the Bourbon exchange that would constrain CenturyTel’s exercise of monopoly power. One of the goals of deregulation is to control prices with competitive pressures and I believe that Fidelity does not satisfy this objective. Furthermore, I question whether the legislature intended for a telecommunications company to be deemed a competitor when it is not offering services to additional customers in the exchange.

In addition to the question regarding the nature of the wireline competition in the Bourbon exchange, there is also an issue regarding the nature and extent to which wireless competition exists in the Bourbon exchange. As expressed in my dissent in the Sprint competitive classification case (Case No. IO-2006-0092), I believe that Section 392.245.5 requires a definitive showing that the named wireless carrier actually provide basic local telecommunications service within the exchange. Pursuant to the definition found in Section 386.020(4), this requires that the named competitor offer two-way switched voice service within a local calling scope without the customer incurring a toll charge. In the case at hand, while Verizon Wireless indicates that it has both coverage and facilities in the Bourbon exchange, Staff was unable to confirm and Verizon did not verify whether Verizon Wireless or any other wireless provider actually provided local service in the exchange versus merely providing coverage to customers traveling through the exchange.

Based upon the absence of a clear wireless or wireline competitor, I would not have granted competitive classification for business services in the Bourbon exchange. As such, I submit this concurrence.

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**In the Matter of Spectra Communications Group, LLC, d/b/a
CenturyTel's Request for Competitive Classification Pur-
suant to Section 392.245.5, RSMo (2005).**

*Case No. IO-2006-0108
Decided October 4, 2005*

Telecommunications §40. Spectra Communications Group, L.L.C. filed its request for competitive classification pursuant to 392.245.5, RSMo Supp. 2005. They seek competitive classification for its residential basic local telecommunications services in five exchanges and seek competitive classification for its business basic local telecommunications services in four exchanges.

APPEARANCES

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David A. Meyer, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History and Positions of the Parties

On September 9, 2005, Spectra Communications Group, L.L.C., doing business as CenturyTel, filed its Request for Competitive Classification pursuant to Section 392.245.5, RSMo Supp. 2005, supported by five exhibits. Therein, Spectra

seeks competitive classification for its residential basic local telecommunications services in five exchanges: Ewing, LaBelle, Lewistown, Macon, and Savannah. Spectra also seeks competitive classification for its business basic local telecommunications services in four exchanges: Ewing, LaBelle, Lewistown, and Macon. Competitive classification will permit Spectra greater flexibility in pricing its services in recognition that at least two unaffiliated competitors are operating in each of those exchanges. Spectra simultaneously filed its Motion for Protective Order in order to safeguard certain proprietary and highly confidential business information that it expected would be implicated in these proceedings. Together with its Request, Spectra also filed tariffs with a 30-day effective date, that is, October 9, 2005.

The Commission issued its Order and Notice on September 12, 2005, directing parties wishing to intervene in the case to do so by September 16. Because the statute authorizing Spectra's application set a time limit of only 30 days for the Commission's proceedings, the Commission also set a procedural schedule and set a hearing for September 23. On the same day, the Commission adopted its standard protective order. On September 16, NPG Cable, Inc., doing business as St. Joseph Cablevision, Inc., moved to intervene. No other applications for intervention were received.

On September 19, as called for in the procedural schedule, NPG Cable, the Office of the Public Counsel, and the Commission's Staff filed objections. NPG Cable asserted that Spectra, who relied on it as one of its competitors in the Savannah Exchange, both misnamed it and mischaracterized its services. The Public Counsel, citing the possible consequences to consumers, called on the Commission to require Spectra to strictly meet its evidentiary burden in each exchange for which it requested competitive classification. The Commission's Staff stated that it agreed that Spectra met the statutory requirements for both business and residential services in the exchanges of Ewing, LaBelle, Lewistown, and Macon. However, Staff asserted that it could not corroborate Spectra's allegations as to the Savannah Exchange and so objected. Staff also filed the prepared Direct Testimony of John Van Eschen on September 19.

On September 21, the Commission issued its Order Directing Filing, directing "both Staff and Spectra [to] file pleadings stating, for each CMRS carrier in each exchange for which competitive classification is sought, whether or not a call from a Spectra Basic Local service subscriber in that exchange to a subscriber of the CMRS carrier resident in the same exchange would be rated and billed as a local call." The verified responses were due on September 22, later extended to September 26. Staff's Response, received on September 23, stated that such a call would only be a local call in the Macon Exchange. Spectra's Response, received on September 26, stated that Spectra did not contest the findings reported by Staff in its filing of September 23. Spectra further stated that the requested information was irrelevant in view of the statutory standard governing its application.

On September 22, Spectra filed its Pretrial Brief, List of Witnesses, and Proposed Findings of Fact and Conclusions of Law. Spectra had filed the prepared Direct Testimony of its witness, Arthur Martinez, on September 21. On September 23, Staff filed its Pretrial Brief, List of Witnesses, and Proposed Findings of Fact and

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Conclusions of Law. Staff also filed the prepared Supplemental Direct Testimony of John Van Eschen on September 23. In these filings, Staff changed its position. It withdrew its previous objection with respect to the competitive classification of Spectra's residential basic local telecommunications services in the Savannah Exchange.

On September 22, the Commission took up this case for discussion at its regularly scheduled Agenda session. The Commission directed that all of the purported competitors named by Spectra in its application be made parties so that they would be available at the hearing to answer questions. Consequently, it was necessary to reset the hearing from September 23 to September 28. The Commission accordingly issued its Order Granting Intervention, Resetting Hearing, Adding Parties, and Directing Filing. The intervention granted was that of NPG Cable.¹ The parties added were the carriers identified by Spectra as its competitors, other than NPG:

Mark Twain Communications Company, Chariton Valley Telecom Corporation, ALLTEL Communications, Inc., United States Cellular Corporation, Sprint Spectrum L.P., doing business as Sprint PCS, Southwestern Bell Wireless L.L.C., doing business as Cingular, Nextel West Corporation, T-Mobile USA, Inc., and those entities that do business as Verizon Wireless, including Verizon Wireless, Cybertel Cellular Telephone Company, CMT Partners, CELLCO Partnership, Ameritech Cellular, and Ameritech Mobile Communications.

The order also sought additional material information from the parties prior to the hearing:

That the carriers listed . . . above . . . shall each file a verified pleading, on or before 5:00 p.m. on Tuesday, September 27, 2005, stating, for each exchange under consideration in this proceeding, whether or not it has at least two residential customers and two business customers whose addresses are located within that exchange. The exchanges under consideration are: Ewing, LaBelle, Lewistown, Macon, and Savannah.

Also on September 23, Spectra, Staff and the Public Counsel filed their Joint Recommendation. Therein, these parties urge the Commission to grant Spectra's application on the grounds that the evidence already available shows that the statutory standard has been met. Public Counsel, in this pleading, changed his position and abandoned his request that Spectra be required to strictly prove its case.²

¹ NPG filed a pleading seeking to withdraw its Application to Intervene on September 22; the Commission denied that request.

² Tr. 11-12: Mr. Dandino: "We are satisfied."

ALLTEL filed its verified response on September 26, stating that while it provides wireless, two-way voice communications services to customers in the Ewing, LaBelle and Lewistown Exchanges, it does not categorize them as either "residential" or "business" customers and so cannot respond further.

Mark Twain Communications Company filed its verified response on September 27, stating that it is a Competitive Local Exchange Company ("CLEC"), that it is certificated to provide basic local telecommunications services in the Ewing, Labelle and Lewistown Exchanges, and that it currently provides such services to at least two residential and two business customers in each of those exchanges.

Chariton Valley Telecom Corporation also filed its verified response on September 27, stating that it is a CLEC, that it is certificated to provide basic local telecommunications services in the Macon Exchange, and that it currently provides such services to at least two residential and two business customers in that exchange.

The entities that do business as Verizon Wireless also filed their verified response on September 27, stating that they have both "coverage" and "network facilities" in the Savannah Exchange. On September 29, the Verizon Wireless entities amended their response and stated that they could not confirm that they have either two business or two residential customers in any of the five exchanges under consideration in this case.

United States Cellular Corporation also filed its verified response on September 27, stating that it has at least two residential customers in each of the Ewing, LaBelle, Lewistown, Macon, and Savannah Exchanges and at least two business customers in each of the Ewing, LaBelle, Lewistown, and Macon Exchanges.

T-Mobile USA, Inc., also filed its verified response on September 27, stating that it is a Commercial Mobile Radio Service ("CMRS") telecommunications provider, that it provides such services through several entities in Missouri, all doing business as T-Mobile, and that it has no customers in the exchanges under consideration in this proceeding. T-Mobile also challenges the Commission's jurisdiction to make it a party to this case and asserts that the services that it does provide do not constitute "basic local telecommunications services" for the purposes of this case.

Sprint Spectrum L.P., doing business as Sprint PCS, and Nextel West Corporation jointly filed their response on September 27, stating that they currently have at least two residential customers and two business customers in the Macon and Savannah Exchanges.

NPG also filed its response on September 27, stating that it provides voice-over-internet protocol ("VoIP") services to at least two residential, but no business, customers in the Savannah Exchange.

The Commission held an evidentiary hearing on September 28, 2005. Certain parties appeared by counsel: Spectra, ALLTEL Communications, the Verizon Wireless entities, Mark Twain, Chariton Valley, Staff, and the Office of the Public Counsel. The remaining parties did not appear and were not excused. The Commission heard testimony from three witnesses and received 16 exhibits.

The parties were offered an opportunity for closing arguments at the close of the evidence; all but Spectra declined. No post-hearing briefs were permitted.

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After the hearing, in addition to the amended response filed by the Verizon Wireless entities and referred to earlier, Staff filed Late-filed Exhibit 17 on September 30. That exhibit contains, as requested by the Commission at the hearing, “a discussion of potential issues regarding intermodal (wireline/wireless) local number portability that could be viewed as barriers to customers obtaining local numbers in the exchanges in question.”

The transcript of the hearing was filed on September 30.

On October 3, the Verizon Wireless entities filed a verified pleading responding to certain questions asked from the bench during the hearing. In brief, they stated that the local incumbent had full control as to whether or not a call by one of its wireline basic local subscribers to a wireless subscriber resident in the same exchange would be a non-toll call. Also on October 3, the various entities that do business as Cingular Wireless filed a pleading in Case No. IO-2006-0109 that was intended, in part, to provide information requested from that carrier in this case. Cingular stated that it has at least two customers in the LaBelle, Lewistown, Macon, and Savannah Exchanges, but does not distinguish between “business” customers and “residential” customers.³ Cingular also challenged the Commission’s authority to join it as a party in this case.⁴

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to “make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises.”⁵ Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to “every decision and order in a contested case,” to fill in the gaps of Section 386.420.⁶ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law

³ Cingular’s verified Response, filed October 3, 2005.

⁴ *Id.*

⁵ Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (“RSMo”), revision of 2000.

⁶ *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n of Mo.*, 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm’n*, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁷ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁸

Findings of fact are inadequate when they “leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected.”⁹ Findings of fact are also inadequate that “provide no insight into how controlling issues were resolved” or that are “completely conclusory.”¹⁰

With these points in mind, the Commission renders the following Findings of Fact.

The Parties:

Spectra Communications Group L.L.C., doing business as CenturyTel, is a Delaware limited liability corporation and is certificated to provide, and does provide, basic local telecommunications services in 107 Missouri exchanges, including the five exchanges at issue in this case: Ewing, LaBelle, Lewistown, Macon, and Savannah.¹¹ Pursuant to an order of the Commission, Spectra is a large incumbent local exchange carrier (“ILEC”) subject to Price Cap Regulation under Section 392.245, RSMo.¹²

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to “represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]”¹³

⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

⁸ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

⁹ *St. ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

¹⁰ *St. ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

¹¹ *In the Matter of the Joint Application of GTE Midwest Incorporated and Spectra Communications Group, L.L.C.*, Case No. TM-2000-182 (*Report and Order*, issued on April 4, 2000), p. 2; Spectra's verified Request for Competitive Classification, filed in this case on September 9, 2005.

¹² *In the Matter of the Petition of Spectra Communications Group, L.L.C., doing business as CenturyTel*, Case No. IO-2003-0132 (*Order Approving Price Cap Regulation*, issued on December 17, 2002).

¹³ Sections 386.700 and 386.710.

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The Staff of the Commission traditionally appears as a party in Commission proceedings and is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]"¹⁴

The Telecommunication Carrier Parties and their Services:

Mark Twain Communications Company is a CLEC that it is certificated to provide basic local telecommunications services in the Ewing, Labelle and Lewistown Exchanges. Mark Twain currently provides such services to at least two residential and two business customers in each of those exchanges.¹⁵

Chariton Valley Telecom Corporation is a CLEC that it is certificated to provide basic local telecommunications services in the Macon Exchange and currently does provide such services to at least two residential and two business customers in that exchange.¹⁶ Chariton Valley's General Manager recently offered testimony in another case that Chariton Valley "constructed an underground fiber-to-the-premise network using passive optical network (PON) technology. The network consists of four (4) fiber nodes within the city limits of Macon with fiber buried to most business and residential locations."¹⁷ Chariton Valley's Annual Report for 2004 states that its full-facilities-based residential lines in Macon number 1,095, while its full-facilities-based business lines number 354.¹⁸

ALLTEL Communications, Inc., is a CMRS provider and currently provides wireless, two-way voice communications services to customers in the Ewing, LaBelle and Lewistown Exchanges. ALLTEL does not categorize its customers as either "residential" customers or "business" customers.¹⁹

Southwestern Bell Wireless LLC, doing business as Cingular, is a CMRS provider. Cingular responded late on October 3, stating that it has at least two customers in the LaBelle, Lewistown, Macon, and Savannah Exchanges, but does not distinguish between "business" customers and "residential" customers.²⁰

Sprint Spectrum L.P., doing business as Sprint PCS, Sprint Spectrum L.P., doing business as Sprint PCS, and Nextel West Corporation²¹ jointly filed their response on September 27, stating that they currently have at least two residential customers and two business customers in the Macon and Savannah Exchanges.²² Sprint and Nextel are CMRS providers.²³

¹⁴ Section 386.071.

¹⁵ Mark Twain's verified pleading filed on September 27, 2005; Tr. 69.

¹⁶ Chariton Valley's verified pleading filed on September 27, 2005; Tr. 70.

¹⁷ James Simon, Direct Testimony, filed on September 2, 2005, in Case No. TO-2005-0423; *quoted by Martinez, supra*, at p. 11.

¹⁸ Tr. 38, 70.

¹⁹ ALLTEL's verified response filed on September 26, 2005; Tr. pp. 13, 15-16.

²⁰ Cingular's verified Response, filed October 3, 2005.

²¹ Nextel West Corporation is a CMRS provider recently acquired by Sprint. See Sprint's verified response, filed on September 27, 2005.

²² Sprint's verified response, filed on September 27, 2005.

²³ Tr. 69.

T-Mobile USA, Inc., is a CMRS telecommunications provider that it provides such services through several entities in Missouri, all doing business as T-Mobile. T-Mobile has no customers in the exchanges under consideration in this proceeding.²⁴

United States Cellular Corporation, also known as U.S. Cellular, is a CMRS provider that has at least two residential customers in each of the Ewing, LaBelle, Lewistown, Macon, and Savannah Exchanges and at least two business customers in each of the Ewing, LaBelle, Lewistown, and Macon Exchanges.²⁵ U.S. Cellular has a block of local numbers in the Macon Exchange.²⁶

Verizon Wireless is the trade name under which several entities, including Verizon Wireless, VAW, L.L.C., Cellco Partnership and Cybertel Cellular Telephone Company, provide CMRS services in Missouri. The Verizon Wireless entities have stated that they cannot confirm that they have either two business or two residential customers in any of the five exchanges under consideration in this case.²⁷

NPG Cable, Inc., doing business as St. Joseph Cablevision, Inc., provides voice-over-internet protocol ("VoIP") services to at least two residential, but no business, customers in the Savannah Exchange.²⁸ NPG is not certificated by this Commission.²⁹ The services offered by NPG include two-way voice service cable of receiving calls from a provider of basic local telecommunications services.³⁰ NPG's service does not require the use of a third-party, unaffiliated broadband network or dial-up Internet network for the origination of local voice service.³¹ Spectra produced a list of over 60 of its basic local customers whose telephone numbers have been ported to Sprint on behalf of NPG.³²

More specifically, NPG offers Digital Phone service to residential customers within the exchanges of Agency, St. Joseph and Savannah where it offers cable TV service.³³ It does not offer the same or a similar service to business customers.³⁴ NPG uses its own cable TV network to connect to the residential customer's premises.³⁵ NPG supplies a box or adaptor to its subscribers that is placed at the customer's residence.³⁶ The adaptor interfaces with the customer's existing inside wiring so the customer can use existing telephone equipment and jacks.³⁷ The

²⁴ T-Mobile's verified pleading, filed on September 27, 2005.

²⁵ U.S. Cellular's verified pleading, filed on September 27, 2005; Tr. 66.

²⁶ Tr. 86 (Van Eschen).

²⁷ Verizon Wireless' Amended Response (verified), filed on September 29, 2005; Tr. 96.

²⁸ NPG's verified Response, filed on September 27, 2005; see Tr. 103.

²⁹ Van Eschen, Supplemental Direct, p. 4.

³⁰ *Id.*, at pp. 4-5.

³¹ *Id.*, at p. 5; Tr. 72.

³² Martinez, Direct Testimony, at p. 16; Ex. 2 (HC); Tr. 31.

³³ *Id.*, at p. 2.

³⁴ *Id.*

³⁵ *Id.*; Tr. 95.

³⁶ *Id.*

³⁷ *Id.*

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adaptor alters the format of a voice call so that it traverses NPG's cable TV network using an Internet protocol.³⁸ NPG routes all calls to Sprint, which interfaces with the public switched network.³⁹ Sprint performs all switching functions for NPG.⁴⁰ Sprint converts the call's format from the Internet protocol format to the time division multiplex format used by the public switched telephone network, depending on whether the call traverses the public switched telephone network.⁴¹ Sprint obtains telephone numbers for NPG and places the telephone numbers for NPG in the appropriate 911 data base.⁴² Sprint also provides such services as operator services and directory assistance services for NPG.⁴³ Sprint does not bill NPG's subscribers.⁴⁴ Instead, Sprint is reimbursed for the wholesale services it provides to NPG by NPG, based on a private contract between the two entities.⁴⁵

Other Findings:

None of the parties that are telecommunications carriers is affiliated in any way with Spectra.⁴⁶

Mark Twain, Chariton Valley and NPG provide services using facilities that they own in whole or in part. Mark Twain provides local voice service in the Ewing, LaBelle and Lewistown Exchanges, and Chariton Valley provides local voice service in the Macon Exchange, using their own loops and switching facilities.⁴⁷ NPG provides local voice service in the Savannah Exchange using its own cable TV network.⁴⁸

Spectra is able to port numbers to any wireless provider in its exchanges; it is LNP compliant in every exchange.⁴⁹ However, it is not clear on the record whether the wireless carriers implicated in this case have a corresponding capability to receive the ported numbers.⁵⁰

The calling scope available to a wireline basic local service subscriber is determined by the Commission-approved tariffs of his or her carrier.⁵¹ Wireless carriers, in contrast, do not structure their offerings in terms of exchanges.⁵² The

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*, at p. 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Spectra's verified Request, pp. 2 and 4; Martinez, Direct Testimony, pp. 6-7.

⁴⁷ Van Eschen, Direct Testimony, Sch. 3; Tr. 92 ("We considered those service arrangements to be a full-facilities-based arrangement."); 93-94.

⁴⁸ Van Eschen, Supplemental Direct Testimony, p. 2.

⁴⁹ Tr. 60-63, 73 (Martinez). "LNP" means Local Number Portability.

⁵⁰ Tr. 110 (Van Eschen).

⁵¹ Tr. 116 (Van Eschen).

⁵² *Id.*

calling scope available to a wireless subscriber is a matter of contract between the carrier and the subscriber.⁵³

In only one case – U.S. Cellular in the Macon Exchange – was Staff able to verify that any of the wireless providers implicated in this case has a block of local numbers.⁵⁴ Other arrangements can also result in a wireline-to-wireless call being a non-toll call, such as where the wireless number is a local number that has been ported to the wireless provider or where the wireless provider has a Type 1 interconnection with the incumbent in that exchange.⁵⁵ Still another method would be the existence of an EAS route between the subject exchange and another exchange where there may be a wireless number that would permit local toll-free calling to that wireless number.⁵⁶ However, there is no evidence that Spectra has any such methods in place in any of the five exchanges herein at issue.⁵⁷ Based on the record before it, the Commission finds that a call by a Spectra basic local subscriber to a wireless subscriber residing in the same exchange would only be a non-toll call with respect to the block of local numbers held by U.S. Cellular in the Macon Exchange.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

Spectra is a “local exchange telecommunications company” and a “public utility” within the intendments of Section 386.020, RSMo. The Missouri Public Service Commission therefore has jurisdiction over this case pursuant to Section 392.245.5, RSMo Supp. 2005.

The Controlling Statute:

In pertinent part, Section 392.245.5, RSMo Supp. 2005, provides:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be

⁵³ Tr. 117 (Van Eschen).

⁵⁴ Tr. 86-87 (Van Eschen).

⁵⁵ Tr. 88, 110 (Van Eschen).

⁵⁶ Tr. 109-110 (Van Eschen).

⁵⁷ Tr. 89 (Van Eschen).

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classified as competitive in an exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange. For purposes of this subsection:

(1) commercial mobile service providers as identified in 47 U.S.C. Section 332(D) (1) and 47 C. F.R. Parts 22 or 24 shall be considered as entities providing basic local telecommunications service, provided that only one such non-affiliated provider shall be considered as providing basic local telecommunications service within an exchange;

(2) any entity providing local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest shall be considered as a basic local telecommunications service provider regardless of whether such entity is subject to regulation by the commission. A provider of local voice service that requires the use of a third party, unaffiliated broadband network or dial-up internet network for the origination of local voice service shall not be considered a basic local telecommunications service provider. For purposes of this subsection only, a broadband network is defined as a connection that delivers services at speeds exceeding two hundred kilobits per second in at least one direction;

(3) regardless of the technology utilized, local voice service shall mean two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMO;

(4) telecommunications companies only offering pre-paid telecommunications service or only reselling telecommunications service as defined in subdivision (46) of section 386.020, RSMO, in the exchange being considered for competitive classification shall not be considered entities providing basic telecommunications service; and

(5) prepaid telecommunications service shall mean a local service for which payment is made in advance that excludes access to operator assistance and long distance service;

6) upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine

whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access service, as competitive within such exchange.

* * *

The cited section requires the Commission to classify as competitive an ILEC's residential basic local services, other than exchange access, in any exchange in which at least two non-affiliated competitors are providing basic local telecommunications services to residential customers. The rule for business basic local telecommunications services is identical. Thus, for any exchange for which Spectra seeks competitive classification of either residential or business basic local services, Spectra must show (1) that there are at least two competitors in the exchange, (2) each of which is currently providing basic local services, (3) to at least two customers of the requisite sort.

The statute goes on to provide that one, but only one, of the two required competitors may be a CMRS or wireless provider. The other may be any entity that provides (1) two-way voice service capable of receiving calls from a basic local telecommunications service provider, (2) over facilities that it or its affiliates own, in whole or in part, (3) whether or not it is subject to regulation by the Commission, (4) but not an entity that is a pure reseller of services, or that provides only prepaid services, or whose services require a third party, unaffiliated broadband network or dial-up internet network for the origination of local voice service.

Discussion:

Spectra seeks competitive classification for its residential basic local telecommunications services other than exchange access in five exchanges, and competitive classification for its business basic local telecommunications services in four of the same five exchanges. The exchanges in question are Ewing, LaBelle, Lewistown, Macon, and Savannah.

The evidence as to the showings required by the statute may be conveniently set out in chart form, as follows:

Exchange	Residential		Business	
	Competitor 1 (wireless)	Competitor 2 (non-wireless)	Competitor 1 (wireless)	Competitor 2 (non-wireless)
Ewing	U.S. Cellular	Mark Twain	U.S. Cellular	Mark Twain
LaBelle	U.S. Cellular	Mark Twain	U.S. Cellular	Mark Twain
Lewistown	U.S. Cellular	Mark Twain	U.S. Cellular	Mark Twain
Macon	U.S. Cellular SprintPCS/Nextel	Charlton Valley	U.S. Cellular SprintPCS/Nextel	Charlton Valley
Savannah	U.S. Cellular SprintPCS/Nextel	NPG Cable	SprintPCS/Nextel	-

The record shows, and the Commission finds, that U.S. Cellular serves at least two business and two residential customers in four of the five exchanges at issue and that Sprint PCS/Nextel serves at least two business and two residential

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customers in two of the five exchanges at issue, including the exchange not served by U.S. Cellular. The record shows, and the Commission finds, that both U.S. Cellular and Sprint PCS/Nextel are CMRS or wireless providers that are not affiliated with Spectra. Thus, the Commission concludes that Spectra has made the required showing for both residential and business services in all five exchanges with respect to one competitor.

Because Spectra has relied on wireless carriers as one of the required competitors in all five exchanges, the second competitor cannot be a wireless carrier. The record shows, and the Commission finds, that Mark Twain serves at least two business and two residential customers in three of the five exchanges at issue and that Chariton Valley serves at least two business and two residential customers in another one of the five exchanges at issue, one that is not served by Mark Twain. The record shows, and the Commission finds, that both Mark Twain and Chariton Valley are full-facilities-based CLECs that are certificated to provide basic local telecommunications services and which are not affiliated with Spectra. As to the last of the five exchanges, the record shows, and the Commission finds, that NPG serves at least two residential customers, but no business customers, over the cable TV network that it owns, using switching and other services purchased from Sprint, a large ILEC. NPG's services include two-way voice service capable of receiving calls from a basic local telecommunications service provider; NPG does not require either a third-party, unaffiliated broadband network or a dial-up internet network for the origination of its local voice service. Thus, the Commission concludes that Spectra has made the required showing of a second, non-wireless competitor in all five exchanges for residential basic local telecommunications services and in four of the five exchanges for business basic local telecommunications services.

Based on its findings and conclusions recited above, the Commission is required to grant Spectra's application for competitive classification of its residential basic local telecommunications services in the Ewing, LaBelle, Lewistown, Macon, and Savannah Exchanges, and its application for competitive classification of its business basic local telecommunications services in the Ewing, LaBelle, Lewistown, and Macon Exchanges. The Commission is also required to approve Spectra's proposed tariff sheets reflecting these reclassifications.

The Commission notes that, except in the Macon Exchange and only for U.S. Cellular's subscribers, the record shows that calls by Spectra's subscribers to their friends, family members and neighbors with cell phones will be toll calls.

IT IS THEREFORE ORDERED:

1. That the Request for Competitive Classification filed on September 9, 2005, by Spectra Communications Group, L.L.C., doing business as CenturyTel, is granted.
2. That the basic local telecommunications services, other than exchange access, provided to residential subscribers by Spectra Communications Group, L.L.C., doing business as CenturyTel, in its Ewing, LaBelle, Lewistown, Macon, and Savannah Exchanges shall be classified as competitive.
3. That the basic local telecommunications services, other than exchange access,

provided to business subscribers by Spectra Communications Group, L.L.C., doing business as CenturyTel, in its Ewing, LaBelle, Lewistown, and Macon Exchanges shall be classified as competitive.

4. That the proposed tariff sheets filed on September 9, 2005, by Spectra Communications Group, L.L.C., doing business as CenturyTel, and assigned Sprint Tariff Tracking Numbers JI-2006-0180, JI-2006-0181, JI-2006-0182, JI-2006-0183, JI-2006-0184, and JI-2006-0185, are approved for service rendered on and after October 9, 2005. The specific tariff sheets approved are:

PSC MO. NO. 1 General and Local Exchange Tariff
Table of Contents, 2nd Revised Sheet 1, Cancels 1st Revised Sheet 1
Section 1, 5th Revised Sheet 1, Cancels 4th Revised Sheet 1
Section 15 Original Sheet 1

PSC MO. NO. 2 Facilities for Intrastate Access
Table of Contents, 1st Revised Sheet 1, Cancels Original Sheet 1
Table of Contents, 1st Revised Sheet 19, Cancels Original Sheet 19
1st Revised Sheet 314, Cancels Original Sheet 314

PSC MO. NO. 3 Long Distance Message Telecommunications Service
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5. That all other motions and objections not specifically ruled upon by the Commission herein are denied or overruled.

6. That this Report and Order shall become effective on October 9, 2005.

7. That this case may be closed on October 10, 2005.

Davis, Chm., and Murray, C., concur, with
separate concurring opinion to follow;
Appling, C., concurs;
Gaw and Clayton, dissent, with separate
dissenting opinion to follow;
and certify compliance with Section 536.080,
RSMo 2000.

**CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY AND
CHAIRMAN JEFF DAVIS**

In its October 4, 2005 Order, the Commission approved Spectra Communications Group, L.L.C. d/b/a CenturyTel's ("Spectra") request for competitive classification in certain of its exchanges pursuant to § 392.245.5, RSMo.¹ While I voted in favor of the Order because I believe that Spectra provided ample evidence to support this conclusion, I write separately to note that certain language within the order was unnecessary and misleading.

In order to qualify for competitive classification in exchanges with business or residential customers, Section 392.245.5 requires:

"Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange."²

The statute goes on to add that in each exchange, a non-affiliated wireless provider "shall be considered as an entity providing basic local telecommunications service" within an exchange, as long as only one such wireless provider is counted.³ Therefore, if an exchange for which a carrier requests competitive classification has one wireline provider⁴ and one wireless provider, the exchange must be declared competitive.

The Order in this case conducts a discussion about local number portability, and the availability of local numbers, non-toll calls and EAS routes for wireless providers in Spectra's markets. This discussion indicates to the reader that these issues are to be taken under consideration by the decision maker to determine whether a wireless provider can be counted as competition under the statute. Nothing in §392.245.5 requires a wireless company to provide local numbers in the incumbent's exchange, or if local numbers are not available, provide toll-free calling or EAS routes. The statute simply states that wireless companies "shall be considered as entities providing basic local telecommunications service". In other words, wireless companies are "deemed" to be providing such service.

In my opinion, the discussion in the Order is irrelevant to the decision and can only be viewed as "dicta". The Commission should refrain from adding language that could create confusion about whether we will be requiring more than is legally necessary to qualify for competitive classification.

¹ Section 392.245, RSMo was amended by Senate Bill 237 (2005), to provide new standards for a finding of competitive classification.

² The same requirements apply to service offered to business customers.

³ See, § 392.245.5(1), RSMo.

⁴ There are additional requirements for a wireline provider, not applicable to wireless providers, to be counted as competition in § 392.245.5, but these are not relevant to the discussion.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

Through its Report and Order issued in the above-captioned docket, the majority has granted competitive classification for residential services provided by Spectra Communications Group ("Spectra") in the Ewing, LaBelle, Lewistown, Macon and Savannah exchanges as well as business services in the Ewing, LaBelle, Lewistown and Macon exchanges. In making its decision, the majority has found the existence of a sufficient presence of both a wireline competitor as well as a wireless competitor in each of the named exchanges for each of the identified services. By this dissenting opinion, I express my disagreement with the majority's finding that wireless competitors are providing basic local telecommunications services at the level required by the new telecommunications law in any of the named exchanges except for Macon. As such, I would disagree with the majority's decision to grant Spectra competitive classification for residential or business services in the Ewing, LaBelle, Lewistown or Savannah exchanges.

As I stated in a previous opinion¹, I assert that Section 392.245.5 requires that the named wireless competitors actually provide basic local telecommunications service within the exchange in question. Section 386.020(4) defines basic local telecommunications service as a "two-way switched voice service within a local calling scope" and specifically excludes those services offered either for an additional monthly fee or with a toll charge. As such, if a wireline customer in the exchange is not able to complete a call to a customer of the wireless carrier with a billing address in that exchange without incurring a toll charge, then the wireless provider should not be considered to be providing basic local telecommunications service within the exchange.

In its Report and Order, the majority specifically recognizes that the record provides no basis for finding wireless competition in any of the exchanges except for Macon.

In only one case – U.S. Cellular in the Macon Exchange – was Staff able to verify that any of the wireless providers implicated in this case has a block of local numbers. Other arrangements can also result in a wireline-to-wireless call being a non-toll call, such as where the wireless number is a local number that has been ported to the wireless provider or where the wireless provider has a Type 1 interconnection with the incumbent in that exchange. Still another method would be the existence of an EAS route between the subject exchange and another exchange where there may be a wireless number that would permit local toll-free calling to that wireless number. However, there is no evidence that Spectra has any such methods in place in any of the five exchanges herein at issue. Based upon

¹ See, *In the Matter of the Application of Sprint Missouri, Inc. for Competitive Classification Under Section 392.245.5 RSMo (2005)*, Case No. IO-2006-0092, Dissenting Opinion of Commissioner Steve Gaw filed October 6, 2005.

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the record before it, the Commission finds that a call by a Spectra basic local subscriber to a wireless subscriber residing in the same exchange would only be a non-toll call with respect to the block of numbers held by U.S. Cellular in the Macon Exchange.²

Given Spectra's inability to show the existence of two competitors in the Ewing, LaBelle, Lewistown and Savannah exchanges, one of which may be a wireless provider, I am unable to find that Spectra has met the requirements of Section 392.245.5. As such, I must dissent from the majority's Report and Order.

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner respectfully dissents from the majority Report and Order granting competitive classification to the applicant in the requested residential and business exchanges. The protections afforded by the Public Service Commission will no longer be present for the customers of the ILEC in these exchanges as competition is presumed to provide a sufficient level of pricing restraint. This Commissioner has issued a number of opinions expressing concerns regarding an adequate level of presence in accordance with the statute. For the sake of brevity, the complete analysis will not be restated here as a review of those other opinions can be found in other cases.¹

The communities at issue in this case are in rural parts of the state and are quite small compared to many of the exchanges that have been competitively classified. For example, three of the exchanges are located in Lewis County and none is larger than LaBelle with its population of 669.² Macon is the largest town included in the applicant's request with a population of 5,538³ and Savannah has a total population of 4,762.⁴

This Commissioner is not satisfied that the statutory definition has been met with regard to wireless service in Ewing, La Belle, Lewistown, and Savannah. Generally, fewer services are available in smaller communities. The applicant has cited a number of wireless companies as actively serving the communities.

² See, *In the Matter of Spectra Communications Group, LLC, d/b/a CenturyTel's Request for Competitive Classification Pursuant to Section 392.245.5, RSMo (2005)*, Report and Order, issued October 4, 2005, at page 15.

¹ See, *In Re Sprint*, Case No. IO-2006-0092, Opinion of Commissioner Clayton, Concurring, in part, and Dissenting, in part; *In Re SBC*, Case No. TO-2006-0093; Opinion of Commissioner Clayton, Dissenting, in part, and Concurring in part; *In Re Centurytel*, Case No. IO-2006-0109, Report and Order, Opinion of Commissioner Clayton, Concurring, in part and Dissenting, in part; *In Re CenturyTel*, Case No. IO-2006-0316, Opinion of Commissioners Clayton, Dissenting, in part, and Concurring, in part; *In Re Spectra*, Case No. IO-2006-0317, Opinion of Commissioners Clayton and Gaw, Dissenting, in part, and Concurring, in part; *In Re Sprint*, Case No. TO-2006-0375, Concurring Opinion of Commissioners Clayton and Gaw.

² U.S. Census Bureau; 2000.

³ U.S. Census Bureau; 2000.

⁴ U.S. Census. Bureau; 2000.

However, the evidence reflects that a customer in Lewistown must travel to another community like Kirksville, Hannibal or Macon to get a wireless phone. In addition, the wireless service that he or she would receive would be using a phone number from that other community. Lewistown residents trying to call their wireless customer neighbor would have to call a long distance phone number. This Commissioner has argued that such a requirement is an example of why the wireless service in these communities is not a comparable service to claim that competition has arrived in this community. This Commissioner believes that the legislature intended for Lewistown wireline customers to be able to make a local call to the wireless customer rather than dial another exchange and potentially another area code.

This Commissioner agrees with the majority regarding the Macon exchange. The record clearly indicated that wireline and wireless service with access to local numbers were available in that exchange and that the competitors were serving customers.

For the foregoing reasons, this Commissioner dissents.

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**In the Matter of the Petition of Alma Telephone Company for
Arbitration of Unresolved Issues Pertaining to a Section
251(b)(5) Agreement with T-Mobile USA, Inc.***

*Case No. IO-2005-0468
Decided October 6, 2005*

Telecommunications §7. Section 251(b) of the Telecommunications Act of 1996 gives the Commission the authority to arbitrate unresolved issues during the negotiation of an interconnection agreement. Commission Rule 4 CSR 240-36.040 governs how a case will proceed once a party has asked for arbitration.

Telecommunications §37. According to FCC rules, interconnection is the linking of two networks for the mutual exchange of traffic. Interconnection is direct when the carrier's facilities or equipment is attached to another carrier's facilities or equipment, and indirect when the attachment occurs through the facilities of equipment of an additional carrier.

Telecommunications §46.1. The Commission relied upon traffic studies to determine the proper split of interMTA/intra MTA traffic, as well as the proper percentage of interMTA traffic that is interstate. The traffic studies, while imperfect, were similar to traffic studies the Commission had relied upon in previous cases.

Telecommunications §46.1. The Commission must apply federal law to decide arbitrations, even if that federal law conflicts with state law. According to FCC rule, reciprocal compensation applies for traffic exchanged between a local exchange carrier and a commercial mobile radio service provider that, at the beginning of the call, originates and terminates within the same Major Trading Area. Thus, it is the Major Trading Area's geographic boundary, and nothing else, that determines whether a local exchange carrier must pay reciprocal compensation. Furthermore, nothing in the FCC rules limits a local exchange carrier's obligation to pay reciprocal compensation to only when a wireless carrier connects directly to the local exchange carrier's network.

Evidence, Practice and Procedure §28. Section 252(b) of the Telecommunications Act requires a petitioning party to provide "all relevant documentation" simultaneously with its petition. T-Mobile argued that the Commission should dismiss Alma's claim because Alma failed to provide cost studies with its petition. The Commission was unwilling to grant such a drastic remedy because Section 252(b) failed to provide a remedy for a violation of that section.

APPEARANCES

Craig S. Johnson, Attorney at Law, 1648-A East Elm Street, Jefferson City, Missouri, 65101, for Alma Telephone Company, Northeast Missouri Rural Telephone Company, Mid-Missouri Telephone Company, and Chariton Valley Telephone Corporation.

Mark P. Johnson, Attorney at Law, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for T-Mobile USA, Inc.

ARBITRATOR: Ronald D. Pridgin, Regulatory Law Judge.

* The Commission, in orders issued on October 13, 2005 and October 18, 2005, denied applications for rehearing in this case. This case was appealed to United States District Court - Western District of Missouri (0504358CVCNKL) and later to the Eighth Circuit Court of Appeals (06-2401).

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Walter Cecil, Regulatory Economist II, Utility Operations Division, Missouri Public Service Commission.

William Haas, Deputy General Counsel, Office of the General Counsel, Missouri Public Service Commission.

ARBITRATION REPORT**PROCEDURAL HISTORY*****Petition for Arbitration:***

On June 7, 2005, Alma Telephone Company, Northeast Missouri Rural Telephone Company, Mid-Missouri Telephone Company, and Chariton Valley Telephone Corporation filed Verified Petitions for Arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. The petitions ask the Commission to arbitrate unresolved issues in the negotiation of interconnection agreements between the Petitioners and T-Mobile USA, Inc. Because the petitions contained common questions of law and fact, the Arbitrator consolidated these cases on June 8, making Case No. IO-2005-0468 the lead case.

Notice of Arbitration:

The arbitration was conducted according to Commission Rule 4 CSR 240-36.040, which governs arbitrations under Section 251 of the Act ("the Rule"). On June 8, as required by Section (7) of the Rule, the Arbitrator issued a Notice of Arbitration, setting July 5 as the date for T-Mobile to respond. That notice also advised the parties of the appointment of the Arbitrator; and adopted the Commission's standard Protective Order. On June 9, the Arbitrator appointed his advisory staff. On June 20, the Arbitrator ordered the parties to appear at a June 29 Initial Arbitration Meeting.

Initial Arbitration Meeting:

The Initial Arbitration Meeting was held on June 29 as scheduled.¹ A principal topic of that meeting was the procedural schedule. Section (15) of the Rule authorizes the Arbitrator to vary the procedures and timelines set out in the Rule as necessary to complete the arbitration within the period specified in the Act:

Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out in this rule; however, the arbitrator's procedures must substantially comply with the procedures listed herein. The arbitrator may vary from the schedule in this rule as long as the arbitrator complies with the deadlines contained in the Act.

¹ The Arbitrator granted T-Mobile's motion to reschedule the meeting from 10:00 a.m. to 2:30 p.m.

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Procedural Schedule:

On June 30, after considering the parties' proposals, the Arbitrator issued an Order Adopting Procedural Schedule. The schedule departed from the timelines in Rule 4 CSR 240-36.040 and modified various procedures so the Arbitrator could complete the arbitration by the required date.

Responses to the Petition for Arbitration:

T-Mobile responded on July 5. In its response, T-Mobile claimed some of the issues that Petitioners raised were beyond the scope of the Act. T-Mobile also disputed Petitioners' positions on other issues, and raised additional issues for the Arbitrator to resolve.

Motions in Limine

As provided in the Order Setting Procedural Schedule, Petitioners and Respondent filed Motions in Limine on July 11. Petitioners asked the Arbitrator to exclude Respondent's evidence and argument that wireless to landline traffic provisioned by interexchange carriers is traffic subject to reciprocal compensation. The Arbitrator denied Petitioners' motion.

Respondent's motion in limine asked the Arbitrator to exclude evidence and argument that traffic Respondent terminated to Petitioners before Petitioners requested interconnection negotiations with Respondent is subject to arbitration. The Arbitrator granted Respondent's motion.

Limited Evidentiary Hearing:

According to the procedural schedule, the parties filed prepared direct and rebuttal testimony. The parties also prepared and filed joint Decision Point Lists ("DPLs"). The Arbitrator held the hearing on August 11. The Arbitrator heard the testimony of 7 witnesses and received 17 exhibits. The Advisory Staff questioned the witnesses.

Arbitration Style:

Rule 4 CSR 240-36.040(5), "Style of Arbitration," provides:²

An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(A) Final offer arbitration shall take the form of issue-by-issue final offer arbitration, unless all of the parties agree to the use of entire package final offer arbitration. The arbitrator in the initial arbitration meeting shall set time limits for submission of final offers and time limits for subsequent final offers, which shall precede the date of a limited evidentiary hearing.

² This style of arbitration is also popularly known as "baseball arbitration," in which an arbitrator picks from the player's and the club's final offer and decides what a Major League Baseball player's salary will be when the parties cannot agree to a contract.

* * *

(E) If a final offer submitted by one (1) or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section.

Rule 4 CSR 240-36.040(19), "Filing of Arbitrator's Draft Report," provides in pertinent part that, "[u]nless the result would be clearly unreasonable or contrary to the public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue."

Arbitration Standards:

In conducting issue-by-issue final offer arbitration, Section 252(c) of the Act provides:

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall --

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

With respect to the public interest in the regulation of telecommunications, the Missouri General Assembly has provided an express statement of public policy to guide the Commission:³

The provisions of this chapter shall be construed to:

(1) Promote universally available and widely affordable telecommunications services;

³ Section 392.185, RSMo Supp. 2002.

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- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

Additional Proceedings:

Rule 4 CSR 240-36.040(24), "Commission's Decision," provides:

The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred seventieth day following the request for negotiation. The commission may adopt, modify or reject the arbitrator's final report, in whole or in part.

DISCUSSION

The parties submitted the open issues requiring resolution in the form of Decision Point Lists (DPLs). These points fall into the following general categories:

1. What proportion of traffic terminating to Petitioners is interMTA and what proportion is intraMTA?
2. What rate should the Arbitrator adopt for intraMTA Respondent traffic terminating to Petitioners?
3. Must Petitioners compensate Respondent for landline-to-mobile intraMTA calls?

STATEMENT OF FINDINGS AND CONCLUSIONS

Attached in compliance with Commission Rule 4 CSR 240-36.040(21) is the Arbitrator's Statement of Findings and Conclusions, consisting of several topical sections in which each Decision Point identified by the parties is considered in the light of the parties' arguments and the evidence they adduced. The Arbitrator has rendered a decision on each such Decision Point or group of related Decision Points and stated the basis therefore. The Arbitrator certifies that each such decision meets the requirements of §§ 251 and 252 of the Act. Unless otherwise stated, the Commission adopts the Arbitrator's decision.

STATEMENT OF FINDINGS AND CONCLUSIONS

The initial pleadings had identified sixteen open issues for resolution. The Arbitrator eliminated five issues (Nos. 1-5 in the arbitration petitions) in his August 3 order on the motions in limine. The parties agree on Issues 6d (interMTA/intraMTA split for Alma Telephone) and 13 (effective date of the TTA). T-Mobile has abandoned Issue 11 (use of cell sites for traffic studies), and consolidated Issues 14 and 15 into Issue 8.

The Commission will resolve the following issues:

6) What proportions of T-Mobile traffic terminating to Chariton Valley, Mid-Missouri and Northeast are interMTA and intraMTA?

Discussion:

The following is a summary of the factors that Chariton Valley's, Mid-Missouri's, and Northeast's traffic studies established. These factors include the interMTA traffic factor and the factor for determining what proportions of interMTA access traffic is interstate and intrastate. This summary also sets forth the factors Petitioners included in their final offers.

T-Mobile offered interMTA factors that were one-half of the factors Petitioners offered.⁴ T-Mobile also proposed factors that assigned more of the interMTA traffic to the interstate jurisdiction. The factors T-Mobile offered are included in parentheses:

Company Proportion	Traffic Study InterMTA Factor	InterMTA Factor Co. offered in Negotiations	Interstate of InterMTA Traffic
Ch. Valley	73.0%	26.0% (13.0%)	20% (50.0%)
Mid-Missouri	16.7%	16.0% (8.0%)	20% (50.0%)
Northeast	100.0%	22.5% (11.25%)	20% (50.0%)

Chariton Valley, Mid-Missouri, and Northeast introduced traffic studies into evidence to support their respective interMTA factors, and also the 20%/80% interstate/intrastate proportions of interMTA traffic. Chariton Valley, Mid-Missouri, and Northeast performed these traffic studies for the T-Mobile wireless-to-landline traffic terminating to them over SBC trunks. These studies measured the proportions of SBC transited wireless-to-landline traffic that are interMTA or intraMTA in

⁴ Tr. 287, lines 8-21.

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jurisdiction. These studies further indicate the proportions of interMTA traffic that are interstate and intrastate.

Chariton Valley, Mid-Missouri, and Northeast performed these studies on actual call data for traffic actually terminated to them. The studies assigned the Major Trading Areas (MTAs) associated with the originating caller's NPA-NXX and the terminating party's NPA-NXX. If the originating and terminating MTAs were different, the calls were categorized as interMTA calls. If the originating and terminating MTAs were the same, the calls were categorized as intraMTA calls.⁵

Chariton Valley, Mid-Missouri, and Northeast further analyzed the interMTA traffic to produce the intrastate/interstate proportions of interMTA traffic. Because interstate access rates are lower than intrastate, the higher the interstate factor, the lower cost T-Mobile's costs will be. Northeast's study showed 22.5% of interMTA traffic to be interstate. Mid-Missouri's study showed 19.259% of interMTA traffic to be interstate. Chariton Valley's study showed 15.9% of the interMTA traffic to be interstate.⁶

The Commission has previously accepted the validity of the method that Chariton Valley, Mid-Missouri, and Northeast used in its traffic studies. In a complaint that involved the same type of traffic—T-Mobile to landline traffic transited by SBC—the Commission adopted the factors established by Mark Twain's study:

“A month-long traffic study for Complainant Mark Twain, based on originating NXXs, suggested that 70% of the traffic is interMTA traffic. Complainant Mark Twain and the Wireless Respondents nonetheless agreed on the 53% factor after negotiation. Based on the traffic study, the Commission finds that 70% of this traffic is interMTA traffic.”⁷

The *BPS* decision is guidance for the Commission's accepting the validity of the studies that Chariton Valley, Mid-Missouri, and Northeast submitted. The Commission accepted the methodology of an NPA-NXX study to ascertain traffic jurisdiction. The Commission accepted the one-month traffic study factor notwithstanding that Mark Twain and T-Mobile had stipulated to a lower factor. Here, Mid-Missouri's study is one month, Chariton Valley's is two months, and Northeast's is a three-month study.

The Commission recognizes that Petitioners' traffic studies, as well as any other traffic study, are imperfect. But in its testimony, T-Mobile stated the Commission should reject any traffic factors not substantiated by empirical studies and appropriate surrogates.⁸ In contrast to Petitioners, T-Mobile offered no empirical studies or appropriate surrogates to support its offered intraMTA/interMTA split.⁹ Furthermore, much of the reason that Petitioners did not have better data was that T-Mobile failed to keep records of the tower location from which the call is made.¹⁰

⁵ See Ex. 1, 3, 5, Attachment 1 (HC) to each. See also Tr. 70-71, 75-78.

⁶ Ex. 1, p. 6; Ex. 3, p. 6; Ex 5, p. 6; Tr. 77-78, 97-98, 111-113, 123.

⁷ *In re BPS Telephone Company*, Case No. TC-2002-1077, Report and Order, page 25 (January 27, 2005).

⁸ Ex 16, p. 14, lines 13-14.

⁹ Tr. 253, line 23 through Tr. 255, line 7.

¹⁰ Ex. 11; Tr. 252, line 11 through Tr. 253, line 16.

T-Mobile acknowledged that it is the only entity that captures the mobile customer's tower location at the time a call is made. T-Mobile chose not to produce that data to Petitioners.¹¹ T-Mobile acknowledged that Chariton Valley's, Mid-Missouri's, and Northeast's studied the only call information available to them.¹² Petitioners' final offers are the following:

Company	InterMTA Factor	Interstate Proportion of InterMTA Traffic
Alma	0.0	N/A
Ch. Valley	26.0%	20%
Mid-Missouri	16.0%	20%
Northeast	22.5%	20%

Decision: The Commission affirms the Arbitrator's decision, and decides this issue in favor of Petitioners, and against T-Mobile.

7) What intraMTA rate should be adopted for intraMTA traffic terminating to Petitioners?

Discussion:

The following summarizes the cost result that each witness has placed into evidence.¹³

Company	Schoonmaker	Conwell
Alma	\$0.0912	\$0.0074
Chariton Valley	\$0.0532	\$0.0074
Mid-Missouri	\$0.0685	\$0.0074
Northeast	\$0.0571	\$0.0074

In reviewing these proposed costs, the Commission can only approve rates that do not exceed the forward-looking economic cost per unit.¹⁴ In addition, Petitioners have the burden to prove their forward-looking costs.¹⁵ For the following reasons, the Commission concludes that Petitioners met their burden.

Each Petitioner offered a 3.5 cent rate for intraMTA traffic. This rate is between 1.82 to 5.72 cents less than the rate that their cost studies show. Petitioners' cost studies are based on the HAI model, which is a widely-accepted method of determining forward-looking economic cost per unit.¹⁶ Petitioners agreed to a 3.5 cent rate in their approved agreements with Cingular, Sprint PCS, Alltel, and US Cellular. Petitioners have offered that same rate to T-Mobile.

¹¹ Ex. 11, T-Mobile's objections to Petitioners' requests for this traffic data.

¹² Tr. 250-262.

¹³ See Exhibit 8, Direct Testimony Schoonmaker, Schedule RCS-1, Page 1. See Exhibit 13, Direct Testimony Conwell, Page 33.

¹⁴ 47 CFR § 51.505(e).

¹⁵ See *id.*; see also *AT&T Communs. of Cal., Inc. v. Pac. Bell Tel. Co.*, 375 F.3d 894, 908 (9th Cir. 2004).

¹⁶ See *In re Mark Twain Rural Telephone Company*, Case No. TT-2001-139, Report and Order, at pages 22-23 (February 8, 2001).

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In contrast, in its final offers, T-Mobile proposed a rate of 1.5 cents. This rate is more than the rate produced in its witness' cost study. T-Mobile's witness made adjustments to Petitioners' results from the HAI model. Some of these adjustments were based on inputs or standards used by Regional Bell Operating Companies and were not necessarily representative of Petitioners' business practices.

T-Mobile previously agreed to a 3.5 cent rate with other Missouri rural ILECs with similar forward-looking costs as developed by Mr. Schoonmaker. T-Mobile has agreed to this 3.5 cent rate with Ozark Telephone Company, Seneca Telephone Company, and Goodman Telephone Company in TK-2004-0166, TK-2004-0167, and TK-2004-0165. The Commission has approved a 3.5 cent intraMTA rate in approximately 70 agreements between rural Missouri ILECs and wireless carriers.¹⁷

T-Mobile calculates a single average cost of \$0.0074, less than eight-tenths of a cent per minute. T-Mobile states individual Petitioner rates should not be allowed to exceed this figure, although T-Mobile offered to accept a \$0.015 rate. The cost that T-Mobile calculates for Petitioners appears to be *less than* the rates T-Mobile pays for traffic exchanged with SBC.

It is counter-intuitive to conclude that the forward-looking costs of Alma, Chariton Valley, Mid-Missouri, and Northeast would be less than those of SBC. Alma serves one rural exchange.¹⁸ Chariton Valley serves about 8,600 customers in 18 rural exchanges.¹⁹ Mid-Missouri serves about 4,200 in 12 rural exchanges.²⁰ Northeast serves about 8,800 customers in 14 rural exchanges.²¹ On a combined basis, Petitioners serve about 22,000 customers in 45 exchanges, an average of about 2,000 per exchange. The Petitioners' costs to serve those exchanges would be at least as high as the costs that a Regional Bell Operating Company, such as SBC, would have to serve its exchanges.²²

Mr. Schoonmaker's study was based upon the most widely used model for calculating forward-looking costs. The HAI model, while imperfect, has evolved and been subjected to a vast amount of peer review and refinement.²³ Mr. Conwell stated that the T-Mobile methodology was his own set of assumptions and interpretations of forward-looking costs.²⁴

The 3.5 cent rate that Petitioners propose is reasonable. This rate is less than the forward-looking costs of each Petitioner as determined by the HAI model. This is the same rate T-Mobile has agreed to with Seneca, Goodman, and Ozark. This

¹⁷ See Petitioners' Motion in Limine, pp. 8-11 (filed July 11, 2005).

¹⁸ Tr. at 128.

¹⁹ Ex. 6, Sch. 10; Tr. at 106.

²⁰ Ex. 4, Sch. 10; Tr. at 83.

²¹ Ex. 2, Sch. 10; Tr. at 47.

²² Ex. 8, pp. 18-19, 24; Ex. 9, pp. 8, 11, 15, 17, 21.; Tr. 167, lines 19-23.

²³ The HAI model was once known as the Hatfield model. See Tr. 171, lines 1-7.

²⁴ See Tr. pp. 217-219

is the same rate that rural ILECs and other wireless carriers have agreed to in the overwhelming majority of approved traffic termination agreements in Missouri.

Also, the Arbitrator noted that in its July 5 response, T-Mobile asked the Arbitrator to dismiss Petitioners' request for an intraMTA rate. For support, T-Mobile stated that Section 252(b)(2) of the Act requires a petitioning party to provide "all relevant documentation" simultaneously with its petition. T-Mobile argues that because Petitioners did not submit cost studies with the petition, Petitioners violated Section 252(b)(2), and the Arbitrator should therefore dismiss Petitioners' claim.

The Commission is unwilling to grant such a drastic remedy. Assuming *arguendo* that Petitioners violated Section 252(b)(2), the statute does not provide any remedy for that violation. The Commission is unwilling to create a remedy, especially one as harsh as dismissing the claim entirely.

Decision: The Commission affirms the Arbitrator's decision, and decides this issue in favor of Petitioners, and against T-Mobile.

8) Are Petitioners required to compensate T-Mobile for landline-to-mobile intraMTA calls?

Discussion:

The Commission has only that authority which the Congress has expressly delegated to it.²⁵ The obligation to apply federal law applies even if state law precedent differs from federal law. The Eighth Circuit has stated: "We must defer to the FCC's view The new regime for regulating compensation in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state law.*"²⁶ The federal courts have jurisdiction over any appeal of arbitration decisions by state commissions.²⁷

²⁵ As a federal district court in Missouri has held, "[a]bsent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication Companies." *AT&T v. Southwestern Bell*, 86 F. Supp. 2d 932, 946 (W.D.Mo.1999).

²⁶ *Southwestern Bell v. FCC*, 225 F.3d 942, 946-47 (8th Cir. 2000)(emphasis added; internal citations omitted); see also *Atlas Telephone v. Oklahoma Corporation Comm'n*, 400 F.3d 1256, 1263 (10th Cir. 2005)("These FCC determinations have since been codified as regulations *binding on the industry and state commissions.*")(emphasis added).

²⁷ See 47 U.S.C. § 252(e)(6)("In any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in the appropriate Federal district court."). See also *Iowa Network Services v. Qwest*, 363 F.3d at 692 ("Once the agreement is either approved or rejected by the [state commission], any aggrieved party is directed by Congress to bring an action in federal court to challenge the [state commission's] determination that the agreement is, or is not, in compliance with §§ 251 and 252."); *id.* at 693-94 ("Congress gave the authority to interpret § 251(b)(5) to the federal courts."). Indeed, Congress has provided that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4).

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With these precepts in mind, the Commission resolves this issue in T-Mobile's favor. As local exchange carriers, Petitioners have the federal statutory "duty to establish *reciprocal* compensation arrangements for the transport and termination of telecommunications."²⁸ FCC implementing rules, affirmed on appeal,²⁹ define the scope of this duty. Specifically, FCC Rule 51.701 provides in relevant part:

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:

* * *

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter.³⁰

Although federal appellate courts have held that the "mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions,"³¹ Petitioners nonetheless ask the Commission to create a new exception. Specifically, the claim that they should be excused from paying reciprocal compensation for intraMTA traffic they deliver to interexchange carriers ("IXCs"). But the Commission may not rewrite or ignore FCC rules.

The Arbitrator addressed this disputed issue in the August 3, 2005 Limine Order:

47 USC 251(b)(5) imposes upon local exchange carriers the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. For purposes of applying reciprocal compensation, 47 CFR 51.701(b)(2) defines telecommunications traffic in relevant part as that "exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area. *The MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies.*

²⁸ 47 U.S.C. § 251(b)(5)(emphasis added). The obligation of CMRS carriers to pay reciprocal compensation is instead based on FCC rules. See 47 U.S.C. § 20.11(b)(2) ("A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.").

²⁹ See *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997). Incumbent LECs chose not to challenge the Eighth Circuit's affirmance of the FCC's LEC-CMRS interconnection rules in their appeal to the Supreme Court. See *AT&T v. Iowa Utilities Board*, 525 U.S. 366.

³⁰ 47 C.F.R. § 51.701(a), (b)(2).

³¹ *Atlas*, 400 F.3d at 1264.

August 3 Order, at (emphasis added). Every federal court that has considered the issue has reached the same conclusion.³² The Eighth Circuit case that Petitioners cite has no bearing on an arbitration case; that case did not involve an LEC-wireless carrier interconnection and compensation. It was merely an appeal of an FCC rulemaking that entitled IXC's to pay access charges based on TELRIC.³³

Decision: The Commission affirms the Arbitrator's decision, and decides this issue in favor of T-Mobile, and against Petitioners.

10) If T-Mobile does not measure landline-to-mobile traffic, should the formula T-Mobile proposes for determining such landline-to-mobile traffic, which takes the volume of mobile to landline traffic, divides it by 65%, and then multiplies that result by 35%, be used to determine the amount of landline-to-mobile intraMTA traffic?

Discussion:

T-Mobile asks the Commission to require the parties to compute the amount of compensation flowing in each direction and make only one payment of the net amount owed, rather than multiple payments. Petitioners have no competing proposal, as they assert that there should be no compensation from wireline to wireless carriers.

The keystone of net billing is that compensation must be reciprocal; that is, the Petitioners will pay T-Mobile for terminating land-to-mobile traffic, and T-Mobile will pay the Petitioners for terminating mobile-to-land traffic. The parties would determine the net amount of the compensation, and make one payment. Recognizing that mobile-to-land traffic might regularly exceed land-to-mobile traffic, T-Mobile would pay the net amount to the LEC each month.

The way that the net billing would work is as follows: IntraMTA MOUs will be identified based on CTUSR records or other mutually acceptable calculation. The IntraMTA MOUs will be divided by 0.65 (sixty-five percent) to determine a total Minutes of Use. Total Minutes of Use will then be multiplied by 0.35 (thirty-five percent) to determine the traffic originated by the ILEC and terminated to T-Mobile. The net difference will be billed.

As Mr. Pruitt testified, net billing is "an industry standard mechanism for capturing the balance of traffic ... while reducing the administrative burden of cross-billing."³⁴ The mechanism is simple, as explained by Mr. Pruitt:

As indicated in Section 5.1.3 of T-Mobile's proposed Traffic Termination Agreement, the LEC would determine how much T-Mobile owes it from terminating traffic sent by T-Mobile, subtract the amount its [sic] owes T-Mobile for terminating

³² See *id.*; see also *WWC License v. Anne C. Boyle, et al.*, No. 4:03CV3393, Slip op. at 5-6 (D. Neb., Jan. 20, 2005); See *Rural Iowa Independent Telephone Ass'n v. Iowa Utilities Board*, No. 4:02-cv-40348; *3 Rivers Telephone v. U.S. WEST*, 2003 U.S. Dist. LEXIS 24871 *67.

³³ See *Comptel v. FCC*, 117 F.3d 1068, 1072-73 (8th Cir. 1997).

³⁴ Ex. 16, p. 24 lines 16-18.

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LEC-originated traffic to T-Mobile customers, and delivering [sic] a payment to T-Mobile for their difference. This would require a single payment every month, rather than a possibility of multiple payments between the parties.³⁵

Mr. Pruitt testified that T-Mobile's proposal to use a 65% measure for the T-Mobile share of traffic generated between it and the LEC is "a standard that's commonly used throughout the industry."³⁶ The amount paid would depend on the volume of traffic and the rate paid for intraMTA termination (Issue 7).

Net billing is difficult to question, once the issue of reciprocal compensation has been resolved. To reduce the number of bills crossing between the parties, and to foster cooperation in determining compensation owed, net billing is the best solution.

Petitioners have not presented any proposal that would capture reciprocal compensation owed to T-Mobile for intraMTA land-to-mobile calls. Also, they have not countered the reasonable balance of traffic that T-Mobile proposed in its Final Offer of 65% mobile-originated and 35% land-originated. The only portion of T-Mobile's proposed billing language the Petitioners have specifically addressed is the definition of certain billing records (the CTUSR, or Cellular Transiting Usage Summary Report) that SBC provides to T-Mobile, upon which the volume of mobile-to-land traffic may be based for billing purposes.³⁷ Petitioners ask that the CTUSR definition be stricken from the TTA because SBC does not currently provide them with these records. The Petitioners misread the proposed language, which allows for flexibility. T-Mobile's proposed net billing language allows the parties to use traffic volume information "identified by CTUSR records plus records of intraMTA calls handed off to IXCs or other mutually acceptable calculation."³⁸ This language allows the parties to identify and agree upon the appropriate sources for determining the volume of mobile-to-land, intraMTA calls delivered to each Petitioner for termination.

Decision: The Commission affirms the Arbitrator's decision, and decides this issue in favor of T-Mobile, and against Petitioners.

12) Depending upon the resolution of Issue 8, should the TTAs include an explicit statement that the compensation obligation for intraMTA traffic is reciprocal and symmetrical?

Discussion:

Much of the discussion with respect to Issue 8 also applies to Issue 12. The Petitioners owe compensation to T-Mobile to terminate their traffic, just as T-Mobile owes compensation to Petitioners for mobile-to-landline IXC traffic. Petitioners have a federal statutory obligation to pay reciprocal compensation – whereby "each

³⁵ Ex. 16, p. 24 line 20 - p. 25 line 3.

³⁶ Tr. 256 lines 23-24.

³⁷ See Pet. Final Offer Mem. at 24-25.

³⁸ See T-Mobile Consolidated Response to Petitions for Arbitration, Exhibit, p. 7 (emphasis added).

carrier [recovers its] costs associated with the transport and termination on each carrier's network facilities of [intraMTA] calls that originate on the network facilities of the *other* carrier."³⁹

1. The Petitioners' reciprocal compensation obligation applies to all intraMTA traffic, whether T-Mobile interconnects with them directly or indirectly.

The type of interconnection that carriers use has nothing to do with the compensation the carriers must pay each other. A carrier's interconnection obligations are set forth in Section 251(a)(1) of the Act; a LEC's reciprocal compensation obligation to transport and terminate traffic is in Section 251(b)(5). Similarly, FCC rules define "interconnection" as "the linking of two networks for the mutual exchange of traffic. *This term does not include the transport and termination of traffic.*"⁴⁰

Section 251(b)(5) requires Petitioners to establish "*reciprocal* compensation arrangements for the . . . termination of telecommunications."⁴¹ FCC rules define "termination" as "the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."⁴² In other words, the Petitioners must compensate T-Mobile for costs incurred in terminating intraMTA traffic originating on the Petitioners' networks. Ordinarily, wireless carriers charge a reciprocal compensation rate that is equal to the rate the incumbent carrier charges it for call termination.⁴³

As discussed above, these rules apply to all intraMTA traffic exchanged between a LEC and a wireless carrier. Nothing in the FCC rules limits an ILEC's reciprocal compensation obligation to when a wireless carrier connects directly to the incumbent's network. The Tenth Circuit has already rejected Petitioners' argument, holding that an "RTC's obligation to establish reciprocal compensation arrangements with the CMRS provider in the instance case is not impacted by the presence or absence of a direct connection."⁴⁴

2. The Petitioners' position on transport costs for intraMTA land-to-mobile traffic conflicts with FCC rules. Historically, wireless carriers and rural LECs have found it most efficient to interconnect indirectly with each other. This is demonstrated by the facts of this case, where the Petitioners' witnesses admitted of only one direct interconnect with a wireless carrier, and that was the direct interconnection between Chariton Valley and its wholly-owned subsidiary, Chariton Valley Wire-

³⁹ 47 U.S.C. § 252(d)(2)(A)(i)(emphasis added).

⁴⁰ See 47 C.F.R. § 51.5 (definition of "interconnection")(emphasis added). According to the FCC, "interconnection is direct when the carrier's facilities or equipment is attached to another carrier's facilities or equipment," and "indirect when the attachment occurs through the facilities or equipment of an additional carrier." *Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806, 17805 n.198 (2000).

⁴¹ 47 U.S.C. § 251(b)(5)(emphasis added).

⁴² 47 C.F.R. § 51.701(d).

⁴³ 47 C.F.R. § 51.711(a) ("Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.").

⁴⁴ *Atlas*, 400 F.3d at 1268.

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less.⁴⁵ In this regard, one of the Petitioners' own trade associations has told the FCC that "[s]ince all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier": "As a practical matter, the most feasible and cost-effective option for most rural ILECs is to use the RBOC's tandem for transiting functions."⁴⁶

Section 251(b)(5) imposes on the Petitioners the duty to establish "reciprocal compensation arrangements for the transport . . . of telecommunications."⁴⁷ FCC rules define "transport" as the transmission of traffic "from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC."⁴⁸ If a rural LEC and wireless carrier were to interconnect directly, the interconnection point ordinarily would be located at the edge of the rural LEC's network. Under a rural LEC's reciprocal compensation obligation, which applies to both "transport and termination," the rural LEC would be responsible for that portion of the facility to the extent it is used for land-to-mobile traffic – just as the wireless carrier would be responsible for that portion of the facility to the extent it is used for mobile-to-land traffic. As the FCC General Counsel explained recently to a federal appellate court:

Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this traffic. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport.⁴⁹

The FCC has made clear that the cost of a direct interconnection facility is to be shared between the two carriers:

If the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the

⁴⁵ Tr. 116, lines 5-22.

⁴⁶ National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?*, at 41.

⁴⁷ 47 U.S.C. § 251(b)(5)(emphasis added).

⁴⁸ 47 C.F.R. § 51.701(c).

⁴⁹ Brief for Federal Communications Commission, *United States Telecom Ass'n, et al. v. FCC*, Nos. 03-1414, 1443, at 35 (D.C. Cir., filed July 9, 2004).

trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier.⁵⁰

The Tenth Circuit has ruled that the “RTCs’ argument that CMRS providers must bear the expense of transporting RTC-originating traffic on the SWB network must fail.”⁵¹ The Petitioners’ own trade association has stated that “the carrier that originates the call will pay for the transiting function.”⁵² If rural LECs must bear the cost of transport for land-to-mobile calls with indirect interconnection, it necessarily follows that they must bear the cost of transport for land-to-mobile calls when direct interconnection is utilized.

Decision: The Commission affirms the Arbitrator’s decision, and decides this issue in favor of T-Mobile, and against Petitioner.⁵³

16) Do the Petitioners have the right to discriminate against T-Mobile by requiring their customers to dial 1+ to reach all T-Mobile customers, including those with telephone numbers in the same locale?

Discussion:

What T-Mobile proposes is nothing more than an abstract statement of law. In the parties’ Decision Points List, they offer no proposed language to the interconnection agreement. The Commission will not rule on this issue. T-Mobile may later file a complaint if it believes the Petitioners are unlawfully discriminating against it.

Decision: The Commission affirms the Arbitrator’s decision to not rule on this issue, as the parties propose no language for the interconnection agreement.

Davis, Chm., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

⁵⁰ *Local Competition Order*, 11 FCC Rcd 15499, 16028 ¶ 1062 (1996). See also *id.* at 16027 ¶ 1062 (“The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility.”); 47 C.F.R. § 51.709(b)(“The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers’ networks shall recover only the costs of the proportion of that trunk capacity used by an interconnection carrier to send traffic that will terminate on the providing carrier’s network.”).

⁵¹ *Atlas Telephone v. Oklahoma Corporation Comm’n*, 400 F.3d at 1267, n.11.

⁵² *Supra* note 46, at 40.

⁵³ The Arbitrator notes that the compensation will be reciprocal, but may not be symmetrical, because the compensation Petitioners and T-Mobile owe each other may not be exactly identical.

In the Matter of the Application of Green Hills Telephone Corporation for Authority to Borrow an Amount Not to Exceed \$22,704,000 from the United States of America Acting through the Rural Utilities Service and the Rural Telephone Bank and in Connection Therewith to Execute a Loan Agreement, Promissory Note, and a Restated Mortgage Security Agreement and Financing Statement.*

*Case No. IF-2005-0506
Decided October 13, 2005*

Telecommunications §19. Green Hills filed a motion to modify the order approving their application to borrow funds and pledge its assets as security for the loan. Green Hills determined that it no longer needed to borrow \$22,704,000 and decreased the amount to \$9,500,000. The Commission agreed.

**ORDER APPROVING FINANCING APPLICATION
AND GRANTING PROTECTIVE ORDER**

Syllabus: This order approves the application of Green Hills Telephone Corporation to borrow up to \$9.5 million and to pledge substantially all its assets as security for the loan in order to fund capital improvements and to finance the operating needs of the Applicant.

On June 30, 2005, Green Hills Telephone Corporation filed its Application seeking authority to borrow certain funds and to execute and deliver certain promissory notes using a portion of its system as security for those notes.

Green Hills is a small, rural incumbent local exchange carrier (ILEC) with approximately 3,200 customers in 13 exchanges in Caldwell, Carroll, Daviess, Linn, Livingston, and Ray Counties, Missouri. Green Hills seeks authority to borrow up to \$22,704,000 from the Rural Utility Services Administration (RUS) of the United States Department of Agriculture for the construction and improvement of its facilities including providing digital loops and broadband capability to all existing and new customers by the end of 2015.

The Commission's Staff filed its Memorandum and Recommendation on September 9, 2005. Staff stated that according to the pro forma financial documents provided by Green Hills, even though the company requests authority to borrow up to \$22,704,000, the company intends to actually borrow only \$9.5 million in five loan draws between now and March 31, 2008. Staff recommended that Green Hills be authorized to borrow up to \$9.5 million. Staff stated that in its opinion the loan of \$9.5 million was not detrimental to the public interest. Staff also requested that the Commission issue an order with the following conditions:

* See page 151 for another order in this case.

- A. That the Commission reserves the right to consider the ratemaking treatment to be afforded these transactions and the resulting cost of capital in a later proceeding;
- B. That the company shall submit an application for Commission approval if Green Hills needs to borrow more than \$9.5 million from RUS;
- C. Within 30 days after the execution of draw-down, the company shall file a report with the Commission's Budget and Fiscal Services Department reflecting the amount of the draw-down and use of the proceeds so that the fee schedule may be applied;
- D. Finding that the money, property and labor to be procured by said transaction is reasonably required for the purposes specified above, and that no part of the proceeds shall be reasonably chargeable to operating expenses or to income; and
- E. Granting such further relief in this matter as the Commission may deem necessary.

Green Hills did not file a response to Staff's recommendation. Although the Office of the Public Counsel is a party to this case, it did not file a recommendation or a response to Staff's recommendation.

As part of its recommendation, Staff included information provided by the company which is considered proprietary. Staff filed a motion on October 7, 2005, requesting that the Commission protect that information from public disclosure. The Commission determines that the information shall be protected as ordered below.

The Commission has reviewed and considered Green Hills' application and the Recommendation and Memorandum of Staff and concludes that the proposed transaction in an amount up to \$9.5 million is not detrimental to the public interest and shall be approved. The Commission will require Green Hills to comply with the conditions recommended by Staff as ordered below.

IT IS THEREFORE ORDERED:

1. That the Motion for Protective Order filed by the Staff of the Commission on October 7, 2005, is granted.
2. That the information noted as Proprietary contained in Staff's Memorandum filed on September 9, 2005, shall be protected from public disclosure.
3. That the Application filed by Green Hills Telephone Corporation on June 30, 2005, is approved with the conditions set out below.
4. That Green Hills Telephone Corporation is authorized to borrow up to \$9.5 million from the Rural Utilities Service.
5. That Green Hills Telephone Corporation is authorized to execute and deliver promissory notes in order to complete the transactions.
6. That Green Hills Telephone Corporation is authorized to do any and all other things incidental, necessary or appropriate to the performance of any and all acts specifically authorized in this order, including executing all documents necessary for the financing authorized in this proceeding.

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7. That Green Hills Telephone Corporation shall apply for further approval to borrow more than \$9.5 million.

8. That the money, property and labor to be procured by the authorized transactions are reasonably required for the purposes specified above, and no part of the proceeds shall be reasonably chargeable to operating expenses or to income.

9. That within 30 days of the execution of a draw down, Green Hills Telephone Corporation shall file a report with the Commission's Budget and Fiscal Services Department reflecting the amount of the draw down and the use of proceeds so that the fee schedule may be applied.

10. That nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes.

11. That the Commission reserves the right to consider the ratemaking treatment to be afforded these transactions and the resulting cost of capital in a later proceeding.

12. That this order shall become effective on October 23, 2005.

13. That this case may be closed on October 24, 2005.

Davis, Chm., Clayton,
and Appling, CC., concur.
Murray, C., dissents.
Gaw, C., abstains.

Dippell, Senior Regulatory Law Judge

In the Matter of the Application of WST, Inc., a Missouri Corporation, for a Variance from Kansas City Power & Light Company's General Rules and Regulations Requiring Individual Metering.

Case No. EE-2006-0123
Decided October 19, 2005

Electric §14. The Commission's regulation that forbids the installation of master electric meters for multi-occupant buildings – 4 CSR 240-20.050 – does not apply to buildings constructed before June 1, 1981.

Electric §9. The Commission has the authority to grant a variance from a provision of an electric company's tariff forbidding the reselling of electricity through a master meter where it is in the public interest to do so.

Electric §41. Where the Commission granted the developer of a condominium building a variance from an electric company's tariff to permit the installation of a master meter to serve all residents of the building, the Commission required the developer to adhere to the relevant consumer protection requirements found in the Commission's regulations.

Appearances

Shawn Stewart, The Stewart Law Firm, 4505 Madison Ave., Kansas City, Missouri 64111, for WST, Inc.

Curtis Blanc, Attorney at Law, 1201 Walnut, Kansas City, Missouri 64111, for Kansas City Power & Light Company

Nathan Williams, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission

REGULATORY LAW JUDGE: Morris L. Woodruff, Senior Regulatory Law Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants WST, Inc.'s request for a variance from the provisions of Kansas City Power & Light Company's tariffs so as to allow KCPL to provide electric service to a newly renovated building through the use of a master meter for the entire building rather than requiring individual metering for each of the condominium units within the building.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically

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address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

WST is the developer of WallStreet Tower Condominiums located at 1101 Walnut Street in downtown Kansas City, Missouri. WST has renovated the 20-story former commercial office building into condominium units, which it is selling to the public. When the tower was constructed its electrical system was designed using a common power distribution scheme. That central electrical system was retained as the building was converted to condominiums. That means that the individual condominium units are not individually metered.

Kansas City Power & Light provides electric service to the tower. On August 16, 2005, KCPL notified WST in writing that KCPL's tariffs would require individual metering to serve the individual condominium units. KCPL also informed WST that if it did not want to install individual meters in its building it would need to ask the Commission for a variance from KCPL's tariff.

WST filed its Application for Variance on September 21. At the same time, WST filed a Motion for Expedited Treatment. WST indicated that its renovation of the tower is in its final stages and that closing on the sale of the first condominium unit is set to occur on October 19. WST asked the Commission to grant its application by that date.

On September 22, the Commission issued an order making KCPL a party to this case. The Commission also directed KCPL and the Commission's Staff to file their responses to WST's application for variance by October 3.

KCPL filed its response on October 3. KCPL confirmed its belief that its tariff requires that electric service to the individual units of the WallStreet Tower Condominiums building be provided through separate meters for each individual unit. KCPL contended that it cannot undertake a practice that would be inconsistent with the requirements of its tariff. If it is to provide service to the tower through a master meter, KCPL argued that the Commission must grant it a variance from the requirements of its tariff. KCPL took no position on whether WST's application for such a variance should be granted.

Staff also filed a response on October 3. Staff indicated its belief that the Commission lacks the authority to waive KCPL's tariff to require KCPL to provide electric service to the tower by means of a master meter.

Because of the need for expedited consideration of WST's application, the Commission scheduled a prehearing conference for October 7, and an evidentiary hearing for October 12. WST, KCPL, and Staff participated in the hearing and presented evidence. Brian Freedock, the owner's representative and construction manager of the project, testified on behalf of WST; Tim Rush, director of regulatory affairs for KCPL, testified on behalf of KCPL; and James Watkins, manager of economic analysis for the Staff, testified on behalf of Staff. The parties gave closing arguments in lieu of post-hearing briefs.

The Project

WST is the owner and developer of the WallStreet Tower Condominiums project at 1101 Walnut Street in downtown Kansas City. The 20-story building is located in what has been designated as a blighted area, and its renovation is part of a plan designed to encourage the redevelopment of Kansas City's downtown urban core.¹ The building that has been renovated was originally built in 1973.² Before renovation it was a general commercial and office building.³ WST purchased the building for between \$12 and \$14 million, and will spend approximately \$20 million to renovate the building.⁴ When renovation is complete, the building will contain approximately 143 residential condominium units with the potential of four commercial units.⁵ The average condominium unit will sell for approximately \$300,000.⁶

The building currently receives electric power from KCPL through a series of transformers located in a vault in the building. Power from the transformers is sent to a master meter owned by KCPL. It is at that point that KCPL measures and bills for the electricity used in the building.

From the master meter, the electricity is distributed through a switchboard and sent throughout the building on a series of bus ducts to the various floors of the building.⁷ The building's electrical distribution system is set up in such a way that the power to each individual unit cannot be separated without renovating the entire system by installing a new switch gear.⁸ The cost of purchasing the switch gear alone would exceed \$250,000.⁹ The cost of making the other revisions of the electrical system required to allow KCPL to install individual meters for each residential units within the building would likely approach \$1 million.¹⁰ Furthermore, the completion of the project would be delayed by approximately six months.¹¹

Rather than have KCPL install an individual meter for each condominium unit, WST proposes that the existing master meter remain in use. KCPL would then bill the WallStreet Tower Condominiums Association, Inc., for all the electricity used in the building. In turn, the Association would bill its members for the electricity they use in their individual condominium units. The cost of electricity used in the common areas of the building would be assessed to the owners of the various condominium units as an expense of operating the condominium. The Association would be responsible for paying the entire bill from KCPL.

¹ Transcript, page 16, lines 2-13.

² Transcript, page 32, lines 7-11.

³ Transcript, page 32, lines 1-6.

⁴ Transcript, page 27, lines 5-16.

⁵ Transcript, page 9, lines 1-3.

⁶ Transcript, page 21, lines 2-5.

⁷ Transcript, page 9, lines 4-15.

⁸ Transcript, page 9, lines 19-25.

⁹ Transcript, page 10, lines 1-7.

¹⁰ Transcript, page 14, lines 12-25.

¹¹ Transcript, page 17, lines 7-14.

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The Association is a corporation that has been registered with the Missouri Secretary of State.¹² At the moment, since no sale of a condominium units has yet closed, WST, the owner of the unsold units, is the only member of the Association.¹³ As the units are sold, their new owners will become members of the Association with equal voting privileges, one vote per member.¹⁴ Once it has sold all the condominium units, WST will no longer have any role in the ownership of the condominium or operation of the Association.¹⁵

The sale of the first condominium unit is scheduled to close on October 19.¹⁶ WST's witness testified that if its application for a master metering variance is not granted by October 19, the closing will proceed with WST retaining responsibility for paying the entire electric bill for the building. However, additional closings are scheduled for October 31 and November 4. At that time, the sale of all units in the upper four floors will have closed with as many as thirty condominium owners ready to move in. At that point, WST would no longer be willing to accept responsibility for paying the electric bill for the entire building.¹⁷

KCPL's Tariff

KCPL contends that the provisions of its tariff will not allow it to provide service to the owners of the condominium units through the existing master meter. It points to a section of its tariff that states that, except in limited circumstances that do not apply here, the company will not supply electric service to a customer for resale or redistribution by the customer.¹⁸ KCPL interprets this provision of its tariff to forbid the sale of electricity to the Association in the manner that the Association has requested.¹⁹

Public Interest Concerns

KCPL's tariff forbidding the resale or redistribution of electricity is related to a federal statute enacted in 1978 and designed to encourage the conservation of energy. The Public Utility Regulatory Act of 1978,²⁰ known as PURPA, requires that individual meters be installed in new buildings to encourage the conservation of energy by the occupants of those buildings.²¹ The Commission promulgated a regulation – 4 CSR 240-20.050 – to implement the requirements of PURPA. That regulation requires that separate metering be installed in buildings constructed after June 1, 1981. However, by its express terms, that regulation does not apply

¹² Transcript, page 12, lines 1-4.

¹³ Transcript, page 34, lines 14-23.

¹⁴ Transcript, page 13, lines 1-4.

¹⁵ Transcript, page 35, lines 1-8.

¹⁶ Transcript, page 16, lines 21-24.

¹⁷ Transcript, pages 33-34, lines 23-25, 1-7.

¹⁸ Kansas City Power & Light Company, P.S.C. MO No. 2, Second Revised Sheet No. 1.19, Section 5.03. This section of the tariff was admitted into evidence as a part of Exhibit 1.

¹⁹ Transcript, page 65, lines 8-11.

²⁰ 16 U.S.C. 2601 et seq.

²¹ 16 U.S.C. 2625(d).

to buildings constructed before June 1, 1981.²² Since it was constructed before 1981, and before Congress passed PURPA, neither PURPA, nor the Commission's regulation would require that the WallStreet Tower Condominiums project be individually metered. However, KCPL's tariff is broader than either PURPA, or the Commission's regulation, in that it does not contain an explicit limitation on its applicability to older buildings.²³

While neither PURPA, nor the Commission's regulation, directly controls KCPL's ability to serve the condominium owners through a master meter, the public policy expressed in that statute and regulation is relevant to the Commission's decision concerning WST's application. Now, more than ever, the public interest is served by promoting the conservation of electricity.

In general, consumers of electricity are more likely to restrict their use of that resource if they are responsible for paying for the electricity that they use. That is the rationale for the restriction on master metering found in PURPA. If a landlord, or in this case a condominium owners association, is paying the bill, the electric consumers will have less incentive to conserve electricity. The Association's plan for allocating the cost of electricity to its members, however, alleviates that concern.

The Association will install monitoring devices to measure the amount of electricity that is actually used in each individual condominium unit. The owner of each unit would then be billed by the Association for the exact amount of electricity used in that unit.²⁴ Staff's witness, James Watkins, conceded that the energy conservation goals of PURPA would be met through the use of the monitoring devices installed by the Association.²⁵

Conservation of energy is not the only concern that Staff has about the Association's plan to serve the residents of WallStreet Tower through a master meter. Staff also pointed out that when the residents of WallStreet Tower are separated from KCPL, the supplier of electricity, by a third party distributing electricity from a master meter, they are no longer customers of KCPL. That means that they are not entitled to receive the consumer protections afforded to KCPL's customers, including regulation by this Commission.²⁶

Staff's concerns about consumer protection are certainly a cause for concern. However, those concerns are alleviated in this case by the fact that the third party that would be redistributing the electricity is a condominium owners association that is subject to the direct control of its members. So long as the consumers who purchase the condominium units are aware of the situation that they are buying into, the Staff's concerns about consumer protection will not swing the balance against approving WST's application for a variance.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

²² 4 CSR 240-20.050(2).

²³ WST argues that there is an implicit limitation on KCPL's tariff. That argument will be addressed in the Conclusions of Law section of this Report and Order.

²⁴ Transcript, page 12, lines 12-17.

²⁵ Transcript, page 59, lines 6-16.

²⁶ Transcript, page 43, lines 12-23.

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KCPL is an “electric corporation” and a “public utility” as those terms are defined in Section 386.020 (15) and (42), RSMo 2000. As such, it is subject to the jurisdiction of this Commission pursuant to Section 386.250, RSMo 2000.

The Commission has a regulation that, in general, requires the use of individual electric meters in multiple occupancy buildings. However, that regulation, 4 CSR 240-20.050, applies only to multiple-occupancy buildings constructed after June 1, 1981. Since the WallStreet Tower was constructed before 1981, the Commission's regulation does not apply, and does not require KCPL to install individual meters in that building.

Two sections of KCPL's tariff relate to the master metering question. Section 5.01 of KCPL's Missouri Tariff No. 2 provides:

INDIVIDUAL METERING FOR SEPARATE PREMISES:

Except as otherwise provided in this Rule 5, the occupant of each separate premises in or on any multiple occupancy premises will be individually metered and supplied electric service as the Customer of the Company, which electric service shall be utilized by the Customer only for the operation of the Customer's installation located in or on the separate premises for which such electric service is supplied pursuant to the Customer's service agreement.²⁷

Section 5.03 of KCPL's Missouri Tariff No. 2 provides:

RESALE AND DISTRIBUTION: Except as provided in Rules 5.05, 5.06 and 5.07²⁸ hereof, the Company will not supply electric service to a Customer for resale or redistribution by the Customer.

(a) “Resale” shall mean the furnishing of electric service by a Customer to another person under any arrangement whereby the Customer makes a specific or separate charge for the electric service so furnished, either in whole or in part, and whether the amount of such charge is determined by submetering, remetering, estimating or rebilling as an additional charge, flat, or excess charge, or otherwise.

(b) “Redistribution” shall mean the furnishing of electric service by the Customer (i) to another building occupied by the Customer and located on the same premises of the Customer but used by the Customer for a separate business enterprise, or (ii) to separate premises occupied by another person, whether or not such premises are owned, leased or controlled by the Customer, without making a specific or separate charge for the electric service so furnished. With

²⁷ Kansas City Power & Light Company, P.S.C. MO No. 2, Second Sheet No. 1.18.

²⁸ Rules 5.05, 5.06 and 5.07 apply only to parties that were reselling or redistributing electricity before January 10, 1966. They do not apply in this case.

respect to any multiple-occupancy premises, the Company will not supply (sic) electric service to the owner, lessee, or operator thereof, as the Customer of the Company, and permit redistribution by such Customer to his office or residential tenants therein, except for those premises being supplied such service on the effective date of this schedule. The restriction against "redistribution" may be waived by the Company where the operation of certain types of multiple occupancy premises, either in whole or in part, makes it impractical for the Company, in its judgment, to separately meter and supply electric service to each occupant as a Customer of the Company. Such exceptions may include:

- (i) An operation catering predominately to transients, such as hotels, motels, and hospitals;
- (ii) An operation where the individual dwelling quarters are not equipped with kitchen and bathroom facilities, such as recognized rooming houses, dormitories, old folks homes, orphanages and eleemosynary institutions;
- (iii) An operation of a building used essentially for general office or commercial purposes where the separate premises leased to office or commercial tenants are adjustable and subject to rearrangement or relocation to conform to the needs of the tenants and the Company deems it would be impractical to rearrange wiring to conform to any such changes;
- (iv) An operation of a transient mobile home court (see Rule 14.02) where electric service is supplied by the Company to the operator, as the Customer of the Company, pursuant to an applicable rule or rate schedule of the Company.

In cases where redistribution is permitted under this Rule 5.03, the Company will supply electric service to the owner, lessee, or operator of such multiple occupancy premises, as the Customer of the Company, under an applicable rate schedule, and the Customer may, by redistribution, furnish electric service to his tenants in or on such multiple occupancy premises on a rent inclusion basis; i.e. as an incident of the tenancy and without a specific or separate charge for the electric service so furnished by the Customer to his tenant, or a variable rental on account thereof.²⁹

By their terms, these two tariff provisions would prevent KCPL from providing electric service to the residents of the WallStreet Tower Condominiums project through the use of a master meter. Clearly, the Association's plan to take electric

²⁹ Kansas City Power & Light Company, P.S.C. MO No. 2, Second Sheet No. 1.19 and Second Sheet No. 1.20.

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service from KCPL through a master meter and then bill its members for the electricity they use in their individual condominium units would constitute the resale of electricity as that practice is defined in section 5.03 of KCPL's tariff.

WST points out that KCPL's separate tariff provision relating to the placing of electric meters in multiple-occupancy buildings – Section 6.03³⁰ – applies only to buildings constructed after June 1, 1981. From this fact, WST argues that Section 5.03 is ambiguous because it does not include a limitation for buildings constructed before 1981. WST would therefore imply a similar limitation in Section 5.03 based on the subsequent adoption of Section 6.03, including the 1981 limitation.

WST's argument is creative, but not persuasive. The plain language of Section 5.03 is clear and unambiguous. The Commission will not strain to create an ambiguity where none exists. KCPL's tariff clearly provides that KCPL may not serve the residents of the WallStreet Tower Condominiums through a master meter. Furthermore, the individual metering requirements promoted by the tariff generally serve the public interest in promoting conservation of energy and in providing protection to consumers. For that reason, the Commission does not want to limit the general applicability of the rule. However, there may be circumstances where adherence to the requirements of the tariff may not promote the public interest. The question then becomes, does the Commission have the authority to grant a variance from that regulation?

WST and KCPL agree that the Commission has the authority needed to grant the variance requested by WST. WST indicates that the Commission's authority is derived from Section 393.140(11), RSMo 2000, which gives the Commission the authority to require electric corporations to file tariffs. That statute specifically gives the Commission the power to "prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise."

It is also clear that the Commission has granted variances from the questioned provision of KCPL's tariff in the past. In two recent cases, EE-2003-0199³¹ and EE-2003-0282,³² the Commission granted variances from Section 5.03 of KCPL's tariff to allow for the master metering of service to apartment buildings in Kansas City. Since the Commission has granted such variances in the past, and since KCPL agrees that the Commission has the authority to grant such a variance from its tariff, the Commission finds that it has the authority to grant the variance requested by WST, if it is in the public interest to do so.

³⁰ Kansas City Power & Light Company, P.S.C. MO No. 2, Fifth Sheet No. 1.22

³¹ *In the Matter of the Application of Kansas City Power & Light Company for a Variance from the Separate Meter Requirement, Order Granting Variance*, March 27, 2003.

³² *In the Matter of the Application of Kansas City Power & Light Company for a Variance from the Commission's Rule, and Kansas City Power & Light Company's Tariff, that Require Separate Metering for a New Building Located at Bishop Spencer Place, 4301 Madison Avenue, Kansas City, Missouri, Order Granting Variance*, May 13, 2003.

DECISION

Installation of separate meters for each condominium unit in the WallStreet Tower would cost approximately a million dollars and would substantially delay completion of a community redevelopment project that is very important to the future of Kansas City. Furthermore, the public interest in conservation of electrical energy expressed in PURPA and the Commission's master metering regulation will be served by the monitoring of electrical use proposed by WST as an alternative to individual metering of the condominium units.

The public interest in protecting consumers is also met in this case because the entity that will be reselling the electricity to the individual condominium owners will be an association that will include all of those owners. Each unit owner will have one vote in the Association and most of the units have already been sold. Once all the units have been sold, WST, as the developer will no longer be involved in the Association. Furthermore, WST has agreed to insert provisions into the condominium declarations that will incorporate the relevant consumer protections found in the Commission's regulations at 4 CSR 240-13. Presumably, the owners association will act in the best interest of its members. Provided that the individual owners are aware of the situation at the time they purchase their condominium units, they should be able to protect their own interests as consumers.

KCPL indicates that if a master meter is permitted for this building, it would be appropriate for KCPL to provide service to the condominium owners association under its commercial rate schedule, including the terms and conditions of service that apply to that rate. That would mean that the condominium owners association, and not any individual condominium unit owner, would be KCPL's customer. That also means that if the owners association failed to pay the electric bill, KCPL could shut off electric power at the master meter, in effect shutting off power to the owners of individual condominium units.

To assure that the purchasers of condominium units are aware that they will be customers of the condominium owners association rather than customers of KCPL, the Commission will require WST to insert warning language into the declarations of the condominium owners association, which must be recorded and made a part of the real estate record for each of the condominium units. Following the hearing, the Commission directed the parties to submit suggested language to be included in that warning. The Commission will adopt the following language:

**Notice to Condominium Owners Concerning The Provision of
Electric Service at WallStreet Tower**

As a unit owner in the WallStreet Tower condominium project, you are not a customer of Kansas City Power & Light Company ("KCPL"). The consumer protection provisions of KCPL's tariff on file with the Public Service Commission of the State of Missouri do not apply to the WallStreet Tower Condominiums Association, Inc.'s provision of your electric service. Furthermore, the Missouri Public Service Commission does not regulate the service that will be offered by the Association. The terms and conditions of your electric ser-

vice are as set forth in your contractual agreement with the Association. In its declaration, the Association has agreed to abide by the relevant requirements of the Public Service Commission's consumer protection rules regarding billing, notice, and denial of service. These protections do not apply if KCPL shuts off service to the Association. In the event of an interruption in electric service, please contact the Association which will, if necessary, contact KCPL.

Given the particular circumstances that exist in this case, the Commission finds that it would be in the public interest to grant a variance from KCPL's tariff to allow the master metering plan proposed by WST to proceed.

This decision is limited to the circumstances as they exist in this case. KCPL suggested that there may be more condominium development projects underway that will request master metering under similar circumstances. KCPL requests that the Commission provide guidance on how such future developments should be handled. The Commission will not do so in this case, but suggests that KCPL carefully examine its own tariff to determine whether it wishes to make any modifications to that tariff.

IT IS THEREFORE ORDERED:

1. That Kansas City Power & Light Company is granted a variance from the separate meter requirements of its tariffs, including sections 5.01 and 5.03 of Missouri Tariff No. 2, so as to permit the installation of a master meter for WallStreet Tower Condominiums, located at 1101 Walnut Street in Kansas City, Missouri.
2. That WST, Inc., shall insert the following language into the declarations of the WallStreet Tower Condominiums Association, Inc.:

Notice to Condominium Owners Concerning The Provision of Electric Service at WallStreet Tower

As a unit owner in the WallStreet Tower condominium project, you are not a customer of Kansas City Power & Light Company ("KCPL"). The consumer protection provisions of KCPL's tariff on file with the Public Service Commission of the State of Missouri do not apply to the WallStreet Tower Condominiums Association, Inc.'s provision of your electric service. Furthermore, the Missouri Public Service Commission does not regulate the service that will be offered by the Association. The terms and conditions of your electric service are as set forth in your contractual agreement with the Association. In its declaration, the Association has agreed to abide by the relevant requirements of the Public Service Commission's consumer protection rules regarding billing, notice, and denial of service. These protections do not apply if KCPL shuts off service to the Association. In the event of an interruption in electric service, please contact the Association which will, if necessary, contact KCPL.

3. That, in addition, WST, Inc., shall insert into the declarations of the WallStreet Tower Condominiums Association, Inc., language regarding the relevant provisions of Commission Rule 4 CSR 240-13 that WST, Inc., shall submit in a pleading filed in this case no later than October 21, 2005.

4. That all other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.

5. That this Report and Order shall become effective October 28, 2005.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC.,
concur and certify compliance with the provisions
of Section 536.080, RSMo 2000.

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**In the Matter of the Request of Southwestern Bell Telephone,
L.P., d/b/a SBC Missouri, for Competitive Classification
Pursuant to Section 392.245.6, RSMo (2005) – 60-day Peti-
tion.**

*Case No. TO-2006-0102
Decided October 25, 2005*

Telecommunications §40. SBC Missouri filed a petition for competitive classification pursuant to Section 392.245.5. The Commission determines that SBC Missouri shall be granted competitive classification for business services for 31 exchanges and for residential services for 51 exchanges.

APPEARANCES

Leo J. Bub and Paul G. Lane, Attorneys at Law, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, One SBC Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

Michael F. Dandino, Deputy Public Counsel, and *Eric Martin*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus: In this Report and Order, the Commission grants the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification pursuant to Section 392.245.5, RSMo (2005), for business services, other than exchange access service, for 30¹ exchanges. The Commission also grants competitive classification for residential services, other than exchange access service, for 51² exchanges, and denies such classification in one³ exchange.

¹ The exchanges in which the company is granted competitive classification for business services are as follows: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

² The exchanges in which the company is granted competitive classification for its residential services are as follows: Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

³ Competitive classification is denied for the Agency exchange. This exchange is not listed on the proposed tariff and is not included in the 30 or 60-day track of the Petition.

Competitive classification will permit SBC Missouri greater flexibility in pricing its services. In addition, the Commission approves the proposed tariff sheets filed to implement these classifications.

Procedural History

On August 30, 2005, SBC Missouri filed its Petition for Competitive Classification pursuant to Section 392.245.5, RSMo (2005). In its Petition, which was assigned Case No. TO-2006-0093, SBC Missouri requested that the Commission, within 30 days, classify its business and residential services in various exchanges as competitive. SBC Missouri also requested that the Commission, within 60 days, classify the business services in 26⁴ exchanges and the residential services in 49⁵ exchanges as competitive. Concurrent with the filing of its Petition, SBC Missouri filed proposed tariffs with 30-day and 60-day effective dates, reflecting the proposed grants of the requested competitive classifications.

Section 392.245.5, RSMo (2005), provides for an expedited, two-track procedure when a price-cap regulated incumbent local exchange company (ILEC) seeks competitive classification for its services within one or more exchanges. The two procedures are designed as a 30-day track and a 60-day track. By a notice issued September 2, the Commission notified the parties that Case No. TO-2006-0093 would address the portions of the Petition regarding the 30-day track.⁶ By a separate order issued the same day, the Commission opened the present case, TO-2006-0102, to address the portions of the Petition regarding the 60-day track.

Because of the need to proceed expeditiously, the Commission issued an order on September 6, directing its Data Center to send notice of SBC Missouri's application and setting an intervention deadline. The Commission later issued an additional notice and extended the intervention deadline. No party filed an application to intervene.

During the week of October 3, the Commission conducted local public hearings in Carthage, Union, Excelsior Springs, Kennett, Marshall, Hannibal, Kirksville, Mexico, and Moberly, Missouri, for the public to offer comments to the Commission. The Commission conducted an evidentiary hearing on October 12 and 13. SBC Missouri filed Post-hearing Exhibits 8 and 9(HC) on October 18. On October 19, Staff filed Post-hearing Exhibit 11 and the parties filed post-hearing briefs. SBC

⁴ This number was later increased to 30 by the inclusion of the Excelsior Springs Exchange, which was rejected in the 30-day case, and the three additional exchanges identified by Staff (Chaffee, Linn and Montgomery City) as meeting the 30-day criteria.

⁵ This number was later increased to 51 by the inclusion of the San Antonio and Sikeston exchanges, which were rejected in the 30-day case.

⁶ In its Report and Order in Case No. TO-2006-0093, the Commission transferred consideration of competitive classification for business services in the exchanges of Chaffee, Excelsior Spring, Linn, and Montgomery City to the present case, TO-2006-0102. As SBC Missouri had originally requested competitive classification for business services in 26 exchanges, the addition of these four exchanges raised the company's request to 30 exchanges. The Commission also transferred consideration of the residential services in the Joplin and Sikeston exchanges to Case No. TO-2006-0102, which raised SBC Missouri's request from 49 to 51 exchanges.

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Missouri filed its comments to Exhibit 11 on October 21. Post-hearing Exhibits 8, 9(HC), and 11 are hereby received into the record.

Overview:

On July 14, 2005, Senate Bill No. 237⁷ was signed into law; the statutory changes in the bill became effective on August 28, 2005. Senate Bill No. 237 (S.B. 237) changes the process under the price cap statute⁸ for determining whether the business and residential services of a price cap regulated incumbent local exchange company (ILEC) should be classified as competitive in an exchange. Before S.B. 237, the Commission was required to determine whether or not “effective competition” existed for the requested services in the designated exchanges. Under this “effective competition” standard, the Commission considered, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

Under S.B. 237, the Commission is now required to apply an expedited, two-track procedure when a price-cap-regulated ILEC seeks competitive classification for its services within one or more exchanges. The 30-day track establishes a competitive “trigger” that focuses solely on the number of carriers providing “basic local telecommunications service” within an exchange. Under the 30-day track, the Commission must classify as competitive the ILEC’s services (business, residential, or both) as competitive in any exchange in which at least two other carriers, using their own or an affiliate’s facilities in whole or in part, are providing “basic local telecommunications service” within that exchange.⁹

Under the 60-day track, in addition to the specified competitive triggers found in the 30-day track, the statute permits a price cap regulated ILEC to seek competitive classification based on competition from other entities providing “local voice service.” That is, the 60-day track recognizes competition from local voice providers that use the ILEC’s facilities or a third party’s facilities, in addition to recognizing competition from entities providing local service using their own facilities in whole or in part. The statute requires the Commission to grant competitive classification within 60 days unless it determines that such classification is contrary to the public interest.¹⁰

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate

⁷ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo 2005). The portions of the law relevant to this case will be codified at Section 392.245.5, RSMo (2005).

⁸ Section 392.245, RSMo 2000.

⁹ Section 392.245.5, RSMo (2005).

¹⁰ Section 392.245.5, RSMo (2005).

that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Discussion:

Southwestern Bell Telephone, L.P., is a Texas limited partnership, with its principal Missouri office at One SBC Center, Room 3520, St. Louis, Missouri 63101.¹¹ Southwestern Bell Telephone, L.P., is authorized to do business in Missouri, and its fictitious name "SBC Missouri" is duly registered with the Missouri Secretary of State.¹² SBC Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the state of Missouri as those phrases are defined in Section 386.020, RSMo 2000.

SBC Missouri's Petition requests, under the 60-day track, competitive classification in 30 exchanges¹³ for business services and 51 exchanges¹⁴ for residential services. These exchanges are listed on the company's proposed tariff revisions. SBC Missouri later attempted to add the Agency exchange to the list of exchanges in which it requests competitive classification for residential services.

1. The Agency Exchange

The Commission will not grant competitive classification for residential services for the Agency exchange. SBC Missouri did not include the Agency exchange in the 30-day or the 60-day track of the company's original application, and consequently, it was not included in the Commission's notices regarding this case. As discussed in the Conclusions of Law section of this order, the Commission finds that issues of fundamental fairness require that SBC Missouri name, in its Petition, all exchanges in which it seeks competitive classification.

2. The Other Exchanges

SBC Missouri bases its Petition for competitive classification under the 60-day review procedure on competition reflected in various exhibits. SBC Missouri updated these exhibits to include exchanges not granted competitive classification

¹¹ SBC Missouri's verified Petition, para. 10.

¹² SBC Missouri's verified Petition, para. 10, and see Case No. IN-2003-0247.

¹³ The exchanges in which the company requests competitive classification for business services are as follows: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

¹⁴ The exchanges in which the company requests competitive classification for residential services are as follows: Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

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in SBC Missouri's 30-day case and the additional exchanges identified by Staff.¹⁵ These exhibits identify the exchanges for which SBC Missouri seeks competitive classification under the 60-day criteria and identify more than the requisite number of competitors providing local voice service¹⁶ on which SBC Missouri relies to meet the statutory criteria and the source of that information.

SBC Missouri indicates that the data in Revised Exhibits B-1, B-2, B-3 and B-4 reflect only the minimum number of competitors in each of the designated exchanges since there may be additional competitors who are providing service in the exchange.¹⁷ In each exchange, the number of competitors exceeds the statutory requirements for competitive classification.

The Direct Testimony of Craig A. Unruh, SBC Missouri's Executive Director-Regulatory, further supports SBC Missouri's Request for Competitive Classification. He explained that SBC Missouri developed the count of certain CLEC competitors in Revised Exhibits B-1 and B-2 from its internal billing records. Specifically, SBC Missouri confirmed through its internal wholesale billing records that it was providing and billing the CLECs listed in these exhibits for UNE-P or commercial wholesale services, which they use to provide local telecommunications on a retail basis to business or residential customers in each requested exchange. In Unruh Revised Schedules 2(HC) and 3(HC), SBC Missouri named the specific CLEC competitors providing service via each method in each requested exchange. In nearly all the requested exchanges, there are multiple CLECs actively providing service in competition with SBC Missouri via UNE-P or commercial arrangements.¹⁸ For business services, two exchanges had two CLECs listed, many have between 10 and 12 of these types of providers; for residential services, six exchanges had between three and four CLECs listed, with nearly three-quarters having between 8 and 11 of these providers.¹⁹

¹⁵ The original versions of these exhibits were attached to SBC Missouri's Petition for Competitive Classification filed August 30. Updated versions were incorporated into SBC Missouri witness Craig A. Unruh's Direct Testimony filed on September 19, and also into Mr. Unruh's Rebuttal Testimony filed on October 3.

¹⁶ SBC Missouri states that it excluded Cingular from the 30-day trigger review because the statute requires the trigger company to be a non-affiliated entity. SBC Missouri also indicates that it excluded the AT&T companies from its review, even though AT&T remains a competitor. SBC Missouri states that it chose to exclude the AT&T companies from its analysis to avoid issues that parties might raise given the pending acquisition of AT&T by SBC Communications. (Unruh Direct Testimony, pp. 9-10).

¹⁷ For example, SBC Missouri indicates that it has focused only on six of the hundreds of carriers that offer VoIP service and only counts the VoIP providers in exchanges where cable modem service is available (*i.e.*, excluding DSL) and only if the customer in that exchange can port their telephone number or obtain a new local telephone number in the exchange. SBC Missouri relies only on wireless carriers who use their own facilities (ignoring Mobile Virtual Network Operators, or MVNOs, such as Virgin Mobile), and it does not include any competitive services currently being offered by AT&T or its affiliates, prepaid carriers or resellers. The information presented also excludes SBC Missouri affiliates such as Cingular. (Unruh Direct Testimony, p. 9).

¹⁸ Unruh Rebuttal Testimony, Revised Exhibits B-1 and B-2, and Revised Schedules 2(HC) and 3(HC).

¹⁹ *Id.*

SBC Missouri identified wireless carrier competitors in each exchange through Let'sTalk.com, a publicly available website that lists, for any zip code entered, the wireless carriers providing service in that area and various wireless rate plans offered by each carrier. SBC Missouri also identified the service areas of certain local wireless carriers through their websites. There are at least two providers of wireless service²⁰ in each exchange in which competitive classification has been requested by SBC Missouri, thus satisfying one prong of the competitive classification criteria. For both the business and residential exchanges, the vast majority of exchanges have three or four, and with some having as many as five wireless providers.²¹

Further, Revised Exhibits B-1 and B-2 also identify a number of providers of VoIP service that rely on the broadband network of a third party cable television network. The vast majority of exchanges reflect one or more such VoIP providers for both residential and business services.

The evidence satisfies the 60-day criteria in the statute because it shows for each exchange listed in Revised Exhibit B-1 for business services and for each exchange listed in Revised Exhibit B-2 for residential services that:

- There is competition from at least two CLECs providing "local voice" service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent LEC within the meaning of Section 392.245.5(6).
- There is also at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).
- In the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company's broadband network.

No persuasive evidence has been presented showing that these representations are inaccurate and the Commission finds that the evidence presented shows the provision of local voice service that meets the statutory criteria for competitive classification. The Commission finds that SBC Missouri is entitled to a grant of competitive classification for the requested exchanges, except for residential services for the Agency exchange.

The Amended Direct Testimony of John Van Eschen, the Manager of the Telecommunications Department, along with his testimony, describe Staff's investigation, where it identified 17 additional exchanges (15 for business services and two for residential services) that were not listed by SBC Missouri in its original 60-day request but which Staff believes meet the 30-day statutory criteria

²⁰ *Id.*

²¹ *Id.*

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for granting competitive classification for business or residential service (or both) in the requested exchanges.²² In its investigation, Staff used data, such as confidential CLEC annual reports, that was unavailable to SBC Missouri. Staff testified that for residential services, the Joplin and Sikeston exchanges qualify for competitive classification under the 30-day criteria, and that for business services, the exchanges of Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Farley, Linn, Marshall, Mexico, Moberly, Montgomery City, St. Clair, and Union meet the criteria.

Staff based this positive recommendation, in part, on the presence of at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest. With respect to the CLEC competitors, Staff's evidence was based on a review of confidential CLEC annual reports filed with the Commission and telephone calls to some CLECs to discuss their reports.²³ SBC Missouri has also identified at least one wireless provider offering business and residential service within the exchanges using its own facilities in whole or in part. For these 17 exchanges, Staff's evidence provides additional verification that the statutory criteria have been met for granting competitive classification for the requested business or residential services in those exchanges.

Staff and the Office of Public Counsel argue that it would be contrary to the public interest to grant SBC Missouri competitive status for business and residential services in the requested exchanges. Neither Staff nor Public Counsel, however, provided substantial and competent evidence showing that such competitive classification would be contrary to the public interest.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction:

SBC Missouri is a "local exchange telecommunications company" and a "public utility" within the intendments of Section 386.020, RSMo. The Commission has jurisdiction over this matter pursuant to Section 392.245.5, RSMo (2005). This statutory provision requires the Commission, within 60 days, to determine whether the requisite number of entities are providing basic local telecommunications services to business or residential customers, or both, in the requested exchange and to approve tariffs designating services as competitive if such a determination is made unless the Commission finds that such competitive classification is contrary to the public interest.²⁴

The Controlling Statutes:

In pertinent part, Section 392.245.5, RSMo (2005), provides:

²² See also Van Eschen's Amended Direct Testimony.

²³ Van Eschen Amended Direct Testimony, pp. 2, 12-13, Sch. 1, and Van Eschen Rebuttal Testimony, pp. 9-10.

²⁴ Section 392.245.5(6), RSMo (2005).

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in an exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

As the introductory paragraph, this applies to both the 30 and 60-day tracks for obtaining competitive classification.

The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.²⁵ The statute provides that one commercial mobile radio service ("CMRS" or "wireless") provider is to be considered an entity providing "basic local telecommunications services" in an exchange.²⁶ In addition, the statute excludes prepaid service providers and resellers.²⁷

The statute provides that certain additional providers of telecommunications services shall be counted under the 60-day track:

Notwithstanding any other provision of this subsection, any incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service."

Thus, under the 60-day track, the Commission counts as competitors those using the facilities of other companies, including those using the ILEC's facilities, and those providers (such as VoIP providers) that use an unaffiliated company's broadband network.

The Commission must also maintain and consider its own records concerning the regulated carriers who provide local voice service over their own facilities, or through the use of the facilities of another provider of local voice service.²⁸

²⁵ Section 392.245.5(2), RSMo (2005).

²⁶ Section 392.245.5(1), RSMo (2005).

²⁷ Section 392.245.5(4), RSMo (2005).

²⁸ Section 392.245.5(6), RSMo (2005).

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Section 386.020(52) defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service.”

Burden of Proof:

The Missouri Supreme Court has stated that “[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a preposition bears the burden of proving that preposition.”²⁹ SBC Missouri asserts that there are the requisite numbers of entities providing local voice service to business or residential customers, or both, in the specified exchanges. Therefore, SBC Missouri has the burden of proof on this issue, and excluding the Agency exchange, the company has met this burden.

Section 392.245.5(6), RSMo (2005), provides that the Commission “shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.” [Emphasis added.] Here, the parties asserting that the grant of a competitive classification would be contrary to the public interest – Staff and Public Counsel – bear the burden of proof. Neither Staff nor Public Counsel provided sufficient competent and substantial evidence to show that granting competitive classification in the requested exchanges would be contrary to the public interest.

Discussion:

1. The Agency Exchange

The Commission finds that issues of fundamental fairness require that SBC Missouri name, in its Petition, all exchanges in which it seeks competitive classification. Without this requirement, adequate notice cannot be provided and potentially interested entities or persons are denied a meaningful opportunity to intervene in the proceeding or object to the application. SBC Missouri did not request competitive classification of its residential services in the Agency exchange in either the 30-day track or the 60-day track. Consequently, the notices issued by the Commission do not mention the Agency exchange. For these reasons, the Commission will deny SBC Missouri’s request that competitive classification be granted for residential services in the Agency exchange.

2. The Other Exchanges

The Commission concludes that the evidence SBC Missouri presented, discussed in the Findings of Fact above, satisfies the 60-day criteria in the statute because the evidence shows, for the requested exchanges,³⁰ that:

²⁹ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. Banc 1994).

³⁰ For a list of the exchanges in which SBC Missouri requests competitive classification for business services, see footnote 13. See footnote 14 for a list of the exchanges in which SBC Missouri requests competitive classification for residential services.

- There is at least one non-affiliated CLEC providing “local voice” service in whole or in part over facilities in which it or on of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3).
- There is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).
- In the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company’s broadband network.

In addition, the Commission determines that in the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company’s broad-band network.

The Commission notes that with respect to certain exchanges for which Staff has withheld a positive recommendation for competitive classification, it has done so because Staff (and Public Counsel) asserts that such a grant of competitive classification would be contrary to public interest because the CLEC competitors identified by SBC Missouri are only providing service utilizing UNE-P or similar commercial wholesale service from SBC Missouri and should not be counted.³¹ Staff also makes a similar argument with respect to the wireless and VoIP competitors SBC Missouri identified.³²

In taking this position, however, Staff and Public Counsel fail to follow the statute. The statute specifically recognizes competition from:

- . . any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunication facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service.³³

As reflected in S.B. 237’s creation of the separate 60-day track, the Legislature determined that there are other forms of competition in the market beyond that from entities that use their own facilities in whole or in part to provide service. However, the statute does also provide that the Commission “shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.”³⁴

³¹ Van Eschen Amended Direct Testimony, p. 2, and Meisenheimer Rebuttal Testimony, pp. 14-15.

³² Van Eschen Amended Direct Testimony, pp. 20-25.

³³ Section 392.245.5, RSMo (2005), emphasis added.

³⁴ *Id.*

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Staff asserts that granting competitive classification in any exchanges except the 17³⁵ that it supports would be contrary to the public. Although Staff and Public Counsel contend that SBC Missouri bears the burden of proving that such classification is in the public interest, they are incorrect. As noted above, Staff and Public Counsel have the burden of proof on this issue; neither Staff nor Public Counsel has met this burden. Staff attempted to support its claim that competitive classification is contrary to the public interest, but it did so only through vague references to what it sees as flaws in the services of alternative providers such as wireless and VoIP companies, and providers who use the incumbent's facilities on either a UNE-P basis or through commercial agreements.³⁶ Staff opposes counting competitors providing service using UNE-P or commercial wholesale service from an ILEC because Staff questions whether these provisioning methods are "reasonable alternatives" to a CLEC's provision of service using its own facilities.³⁷ Staff raises similar questions with respect to wireless service and VoIP service, claiming that few customers will actually switch their landline telephone service to wireless or VoIP service if the consumer is expected to pay more for local voice service,³⁸ or if the quality of service is perceived to be inferior.³⁹ Staff also questions the ability of these provisioning methods to hold the incumbent LEC's prices in check.⁴⁰ Nonetheless, Staff failed to provide competent and substantial evidence on these issues, and thus, failed to show that the requested grant of competitive classification is contrary to the public interest. Likewise, Public Counsel failed to provide competent and substantial evidence showing that granting competitive classification in the requested exchanges is contrary to the public interest.

In addition, neither Staff nor Public Counsel has presented substantial information showing that SBC Missouri's evidence concerning the exchanges for which SBC Missouri requests competitive classification is inaccurate and the Commission finds that the company's evidence is accurate and correct and demonstrates that the statutory criteria for competitive classification have been met. With respect to the 17 exchanges found by Staff to satisfy the 30-day criteria, the Commission credits Staff's evidence and concludes that such evidence also demonstrates that the statutory criteria has been met for these exchanges.

Thus, the Commission determines that SBC Missouri shall be granted competitive classification for business services for the following 30 exchanges:

Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill,
Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley,
Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn,

³⁵ Staff supports competitive classification in the exchanges of Joplin and Sikeston for residential services, and in Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Farley, Linn, Marshall, Mexico, Moberly, Montgomery City, St. Clair, and Union, for business services.

³⁶ Van Eschen Amended Direct Testimony, pp. 20-29.

³⁷ Van Eschen Rebuttal Testimony, pp. 2-3.

³⁸ Van Eschen Rebuttal Testimony, p. 7.

³⁹ Van Eschen Rebuttal Testimony, p. 6.

⁴⁰ Van Eschen Rebuttal Testimony, p. 7.

Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

In addition, the Commission determines that SBC Missouri is granted competitive classification for residential services for the following 51 exchanges:

Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for business services for the following 30 exchanges:

Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

2. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for residential services for the following 51 exchanges:

Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

3. That the proposed tariff revisions (Tariff File No. YI-2006-0145), filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, to P.S.C. Mo No 35, General Exchange Tariff, Section 32.1, 1st Revised Sheet 2, reflecting the reclassification of SBC Missouri's business services in the exchanges listed in the tariff, are approved.

4. That the proposed tariff revisions (Tariff File No. YI-2006-0145), filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, to P.S.C. Mo No 35, General Exchange Tariff, Section 32.2, 1st Revised Sheet 4, reflecting the reclassification of SBC Missouri's residential services in the exchanges listed in the tariff, are approved.

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5. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for residential services in the Agency exchange is denied.
6. That Post-hearing Exhibits 8, 9(HC), and 11 are received into the record.
7. That all other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.
8. That this Report and Order shall become effective on October 29, 2005.

Davis, Chm., and Appling, C., concur,
with separate concurring opinions to follow;
Murray, C., concurs;
Gaw and Clayton, CC., dissent, with
separate dissenting opinions to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

CONCURRING OPINION OF CHAIRMAN JEFF DAVIS

This commissioner concurs with the result reached in the Report and Order in the above-referenced case and merely wishes to supply additional comments in support thereof.

This is a case of first-impression before this commission whereby an incumbent local exchange company has applied for competitive classification in an exchange pursuant to the provisions of the 60-day competitive classification law found in Section 392.245.5(6), a new law passed in the 2005 Session of the Missouri General Assembly.

The standard of review for determining competitive classification in these cases is found in Section 392.245.5(6), RSMo Supp. 2005, which states in pertinent part:

Notwithstanding any other provision of this subsection, any incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service. **The commission shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.** (Emphasis added.)

This statute establishes a two-pronged test: First, it places the burden of proof on the petitioner to prove competition exists in the relevant exchanges and, once that burden has been met, the commission looks to the second prong of the test, which is simply whether or not competitive classification is contrary the public

interest. This is the only reason the commission can deny such a request under the statute.

The record indicates SBC Missouri presented evidence that competition exists in each one of the exchanges from wireless carriers, VOIP providers and other competitors having commercial agreements and/or UNE-P agreements. There were arguments made to the contrary that some or all of these services do not constitute effective competition, but the statute listed above does not require competition to be effective. It merely requires the presence of competition and there is no requirement that competitors obtain a certain market share or that their competition be of a certain quality.

Once SBC Missouri demonstrated that competition existed in each of the listed exchanges, the burden shifted to any party asserting that SBC Missouri's request was contrary to the public interest. The record in this case, as noted in the Report and Order as well as in Commissioner Appling's concurrence, shows that there is little, if any, competent evidence demonstrating that granting the SBC Missouri request would be contrary to the public interest. To require SBC Missouri to prove that its application was not "contrary to the public interest" would defy logic and the plain meaning of the statute. Accordingly, the only decision this commission could reach was that SBC Missouri's entire request be granted.

Although not discussed in the Report and Order, it is worth noting that Senate Bill 237, the foundation of the legal debate in this case, was passed by near unanimous, bi-partisan majorities in both houses of the Missouri General Assembly. We can only presume that the elected representatives know the will of the people and that we are acting in the best interest of the people of this state by faithfully interpreting this law, despite any perceived shortcomings in the construction thereof or the adjudication process.

Once competitive classification is granted, the only remaining duty of this commission is to closely monitor competition and prices in the given exchanges. This commission takes that charge very seriously and there is no doubt in this commissioner's mind that our staff will zealously perform its duties in this area. To grant a company with the market power of SBC Missouri the unfettered discretion to raise or lower rates causes this commissioner some concern about what might happen when circumstances change and no elected or appointed officials are left to remember the representations made by SBC Missouri to the Governor, the General Assembly or even the Missouri Public Service Commission. Hopefully, competition will thrive in the marketplace and SBC Missouri will prove that this fear is unfounded.

In any event, those concerned about SBC Missouri's dominance and pricing power in the market should find some consolation in that staff is required to issue a report on competition no later than every two years and that, at any time, staff or the Office of Public Counsel can file a complaint alleging that competitive classification for a particular exchange is no longer in the public interest.

It is also my earnest hope that in the future SBC Missouri will be more forthright in the presentation of legal evidence to this commission and in its communications with the public. This commissioner found it particularly troubling, where 30-day and 60-day time limits applied, that SBC Missouri would attempt to present evidence

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in such a way as to not notify its competitors of its filing for competitive classification in a given exchange. Further, in advance of the local public hearings, SBC Missouri representatives attempted to obtain local public support for their application by telling customers that granting their competitive classification request would allow them to lower their rates, but it is apparent from the record that SBC Missouri never communicated to any of these consumers whose support they were eliciting that rates could ever go up as a result of this commission granting their request. In conclusion, SBC Missouri was entitled to win this case as a matter of law, but their conduct only reinforced the belief that further regulatory oversight of SBC Missouri is necessary to protect consumers.

CONCURRING OPINION OF COMMISSIONER APPLING

I concur in the Report and Order but wish to express my concern regarding a case record that was inadequate to support any result other than the one reached by the majority. The Commission is obligated to generate an order based on competent evidence that is substantial enough to support its decision. Because no party assumed the burden to establish that SBC Missouri's application was contrary to the public interest, the argument for denying it was neither clear nor convincing. Without an adequate record, the Commission cannot make a reasonable finding. I hope that, in the future, parties to "competition" cases will step up to the plate and assume responsibility for bringing their best arguments to the table. This will work in the best interests of all concerned.

DISSENTING OPINION OF COMMISSIONERS STEVE GAW AND ROBERT M. CLAYTON III

In its Report and Order in the above-captioned proceeding, the majority has granted competitive classification to 30 business exchanges and 51 residential exchanges of SBC Missouri ("SBC") that were not previously price deregulated in SBC's 30-day competitive classification filing.¹ Of these exchanges, the Report and

¹ See, *In the Matter of the Request of Southwestern Bell Telephone L.P., d/b/a SBC Missouri, for Competitive Classification Pursuant to Section 392.245.6 RSMo (2005) – 30 day Petition*, Case No. TO-2006-0093, Report and Order issued September 26, 2005. ("30-day proceeding"). As the Commission noted in that Order, "[t]he Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition so that interested parties have a meaningful opportunity to intervene and respond to the application. Therefore, the Commission will not consider SBC Missouri's request for competitive classification for business services in the 15 (sic) exchanges that are not listed in the 30-day portion of SBC Missouri's Petition. The Commission will, however, transfer these exchanges to Case No. TO-2006-0102, where they will be evaluated pursuant to the 60-day track of Section 392.245.5." *Report and Order* at page 10. The Commission made a similar finding for the 3 residential exchanges transferred to this proceeding. See, *Report and Order* at page 19.

Order provides for competitive classification for 16 business and 3 residential exchanges that had been previously transferred from the 30-day proceeding on the basis that proper notice had not been given to any entities that may be affected by a Commission order to grant competitive classification.²

As was mentioned in the Report and Order in the 30-day proceeding, the standard to be applied in determining whether a particular service in a particular exchange should be granted competitive classification in a 30-day proceeding is very objective and is based largely upon the simple counting of various competitors.

Under S.B. 237, the focus is solely on the number of carriers providing "basic local telecommunications service" within an exchange. The Commission must classify as competitive the ILEC's services (business, residential, or both) as competitive in any exchange in which at least two other carriers are also providing "basic local telecommunications service" within an exchange.

For the purpose of the 30-day investigation, one commercial mobile radio service ("CMRS" or "wireless") provider is to be considered an entity providing "basic local telecommunications services" in an exchange. The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.³

Recognizing its requirement that the service of such competitors be based upon telecommunications owned "in whole or in part" by the competitor or its affiliate, the General Assembly implicitly excluded UNE-P providers from consideration in the 30-day proceeding.⁴ Moreover, the General Assembly, based upon the "in whole or in part" standard, explicitly precluded other competitors from

² There was initially some confusion whether the majority actually rejected competitive classification for business services in 15 or 16 exchanges and transferred consideration of those exchanges to the current 60-day proceeding. This confusion is caused by conflicting ordered paragraphs regarding the status of business services in the Moberly exchange in the initial 30-day Report and Order. Ordered paragraph 3 granted competitive status for business services in the Moberly exchange. On the other hand, ordered paragraph 5 specifically rejected competitive classification for the same Moberly exchange. As a subsequent Notice of Correction indicates, ordered paragraph should not have included the Moberly exchange. Therefore, business services for the Moberly exchange were transferred with 15 other exchanges and considered in the instant proceeding. The practical effect of this contradiction and correction is not important since the majority subsequently granted competitive status for business services in the Moberly exchange in the 60-day proceeding.

³ 30-day proceeding Report and Order at page 6.

⁴ *Id.* at page 15. "Therefore, this Commission will not rely on the presence of any UNE-P competitor not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO and recent decisions of this Commission, to meet the requirements of Section 392.245.5(2)."

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consideration in the 30-day proceeding including: (1) VoIP providers relying on third-party broadband access (Section 392.245.5(2)); (2) telecommunications resellers (Section 392.245.5(4)); and (3) prepaid telecommunications providers (Section 392.245.5(5)).

In the 60-day proceeding addressed in the instant Report and Order, the General Assembly broadens the Commission's consideration to all types of telecommunications competitors, but also includes a subjective and esoteric "contrary to the public interest" standard.

[A]ny incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service. The commission shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.⁵

Thus, where the 30-day standard did not permit the consideration of certain VoIP providers, telecommunications resellers, UNE-P providers and prepaid telecommunications providers, these entities may now be considered by the Commission in the 60-day proceeding. The presence of these competitors may be sufficient for the Commission to grant competitive classification in a certain exchange for a certain service so long as that grant of competitive classification is not "contrary to the public interest." The General Assembly did not provide, in the context of SB 237, further definition to the "contrary to the public interest" standard to be applied by the Commission. Noticeably, the majority also did not give any definition to the "contrary to the public interest" standard.

While SB 237 does not provide clarification for any determination of the public interest, such a standard was expressed in previous telecommunications legislation. Section 392.185, passed as part of the 1996 rewrite of the Chapter 392, provides nine specific purposes underlying the Missouri Telecommunications Law. Foremost to any consideration of the public interest test to be used in a 60-day proceeding is subsection 6 which provides that one purpose of Chapter 392 is to "[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest." (emphasis added). Given this clear expression of public interest (i.e., the determination of whether competition can act as a substitute for regulation in the protection of ratepayers), the Commission's duty under the 60-day standard becomes clearer.

In its Report and Order, the majority expressly relies upon SBC Revised Exhibits B-1 through B-4. In these exhibits, SBC documents on an exchange basis the various competitors which it claims support a finding that competitive classi-

⁵ Section 392.245.5(6) RSMo 2005 (emphasis added).

fication is "not contrary to the public interest." These exhibits rely almost entirely on the existence of wireless entities⁶, CLECs using commercial arrangements, UNE-P providers and VoIP providers that rely upon third party broadband connections. The majority claims that the mere recitation of these type of providers is sufficient to grant competitive classification because "no persuasive evidence has been presented showing that these representations are inaccurate." Therefore, the Commission concludes that "SBC Missouri is entitled to a grant of competitive classification for the requested exchanges."

This Commission has an obligation to look beyond the superficial evidence provided by SBC in coming to a conclusion in this case. The General Assembly believed that the Commission would utilize the expertise that exists in this agency and ensure that the public interest was tested prior to making a determination in a 60-day filing. In examining the evidence, a finding of "contrary to the public interest" is not only possible, but, in our opinion, mandated based solely on the nature of the competitors identified by SBC, the competitive situation of these competitors, and the public interest standard expressed in Section 392.185.

As was mentioned, SBC relies upon the existence of: (1) wireless entities; (2) UNE-P providers; (3) CLECs using commercial arrangements; and (4) VoIP providers that rely upon third party broadband connections. For the reasons expressed herein, none of these types of competitors can provide the competitive presence to "function as a substitute for regulation" and ensure the "protection of ratepayers" against SBC's exercise of market power.

Wireless Entities: Although the General Assembly recognized the presence of wireless competition, it clearly recognized that the sole existence of such competitors is not sufficient to protect the ratepayers from the ILEC's exercise of market power and function as a substitute for regulation.⁷ In the business sector, wireless service is an inadequate substitute for wireline service because of quality of service concerns as well as the need for business customers to have a directory listing as well as to be included in directory assistance. In the residential sector, wireless acts as a poor substitute because of ongoing E-911 concerns, inadequate wireless coverage, inability to use wireless for dial-up internet access, and exclusion from directories and directory assistance. For all these reasons, while customers have demonstrated a desire for the convenience of wireless service, they have also demonstrated an unwillingness to eliminate their wireline connection. As one recent study indicates "at least 94% of wireless users also maintain

⁶ Interestingly, no one raised a concern with the Commission's reliance upon blatant hearsay evidence in its finding of wireless competition. As mentioned in the majority's decision, SBC identified its wireless carrier competitors in each exchange through Let'sTalk.com. In a time when much is made regarding the quality of evidence provided by certain parties, the majority used hearsay evidence found on the internet and lacking the support of any witness with first-hand knowledge as its basis for finding the presence of wireless competitors.

⁷ In fact, the General Assembly while demanding the presence of two competitors for the consideration of any 30-day competitive filing, have limited the Commission to only counting one wireless provider as a competitor. Clearly, the General Assembly recognized the inherent limitations of wireless services and the inability of these services, no matter the number of wireless providers, to provide competitive presence to replace the function of regulation.

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their traditional wireline telephone service.” As this study then concludes, “whatever nominal amount of substitution may be taking place, it is clearly not sufficient to constrain ILEC market power and ILEC prices.”⁸ As such, wireless service today generally acts as an addition to, not a substitute for, wireline service. Its use and availability have an impact principally on the use of landline long distance service, not as a control of prices for basic local wireline services.

UNE-P Providers: Upon the passage of the '96 Telecom Act and the subsequent promulgation of rules by the FCC, numerous competitive providers sought and were granted the ability to lease, at TELRIC rates, all unbundled elements necessary to provide local telecommunications service. These elements were subsequently combined and local service identical in quality to that of the ILEC was then available to competitors. This method of providing service was labeled the unbundled network element platform (“UNE-P”). Recognizing that the use of UNE-P did not require large amounts of capital in order to enter a market, many competitors relied upon this market entry strategy prior to installing switches and other telecommunications facilities.

Recently, the FCC issued its Triennial Review Remand Order which called for the complete elimination of local switching and, therefore, the provision of UNE-P service. Although the Order provided for a transition mechanism, all UNE-P service is scheduled for elimination by March 11, 2006. Clearly, the existence of local exchange service based upon TELRIC-based UNE-P service is short-lived. This service will no longer exist in five months. Therefore the ability of these providers to protect the ratepayer from the exercise of market power and act as a substitute for competition is non-existent.

CLECs with Commercial Arrangements: Upon the scheduled elimination of TELRIC-based UNE-P service, many CLECs entered into commercial arrangements by which they could still receive UNE-Platform service. Unlike UNE-P service, however, these commercial arrangements were not at TELRIC rates, but instead at higher negotiated wholesale rates, thus reducing the CLECs margin and ability to effectively compete against the incumbent. Furthermore and perhaps more importantly to the situation at hand, the continued provision of UNE-Platform service through a commercial arrangement is not guaranteed by the existence of certain rules and regulations. That is to say, the continued provision of UNE-Platform service by the ILEC through a commercial agreement is subject only to the protections offered by contract law. And, upon the expiration of the initial commercial agreement, the continued availability of the UNE-Platform will be subject only to the whim and caprice of SBC.

Clearly, any decision to grant SBC competitive classification based upon the existence of commercial arrangements with certain CLECs is very questionable. While these CLECs may temporarily have the access to the elements necessary to provide local service, it is highly questionable whether these CLECs will have the margins necessary to discipline SBC in the event the incumbent attempts to exercise market power. Furthermore, because these arrangements have a

⁸ *Confronting Telecom Industry Consolidation – A Regulatory Agenda for Dealing with the Implosion of Competition*, National Association of State Utility Consumer Advocates, published April 2005.

defined expiration date and the decision to grant competitive classification is effectively permanent in nature, these CLECs do not offer any real price discipline for SBC.⁹

VoIP Providers Relying on Third-Party Broadband Access: Like wireless service, the General Assembly recognized the problem with relying upon third-party dependent VoIP providers as a protection against ILEC exercise of market power. Unlike wireless service, however, the General Assembly saw such little competitive pressure from these type of providers that it specifically precluded the Commission from considering such providers in its 30-day determination.¹⁰ Such preclusion is undoubtedly based upon the recognition that such providers are, without the ability to directly access the customer, subject to third-parties for their mere existence in the market. It seems highly questionable, therefore, given the General Assembly's expressed preclusion against considering such tenuous competitors in the 30-day filing, that the majority would find the presence of such competitors in anyway protective of ratepayers.

The day to day existence of third-party dependent VoIP providers is readily apparent. For instance, suppose that the VoIP provider delivers telecommunications service for \$25 / month. By definition, the customer must also pay for a third-party broadband connection that may cost approximately \$30 / month.¹¹ Therefore, the customer faces a total monthly telecommunications / internet bill of \$55 / month. While the VoIP provider may be able to currently compete given such a cost structure, such competition is solely dependent on the continued availability and cost stability of the cable provider's broadband connection. Once faced with an increase in the cost of the broadband connection and / or a decrease in the price of the ILEC's local service offering (e.g., predatory pricing), no matter how temporary, the VoIP's existence becomes, at best, day to day. As stated previously, reliance upon such providers to prevent the ILEC's exercise of market power is highly questionable.

⁹ Section 392.245(13) provides for the Commission to monitor the average rate for nonwireless basic local telecommunications services following the passage of SB 237 and to report its findings to the General Assembly. Presumably, upon a showing of an increase in such rates, the General Assembly could choose to re-regulate these competitively classified ILECs. The obvious question then becomes whether these ILECs are merely subjected again to price cap regulation at the inflated price effectuated during the time period in which the ILEC operated without any price regulation. In this event, the competitive classification is effectively permanent.

¹⁰ See, Section 392.245.5(2) RSMo 2005.

¹¹ Recognizing that ILECs have been unwilling, to date, to provide stand-alone or "naked" DSL, this broadband connection will typically take the form of cable modem service. The refusal on the part of ILECs to provide such a stand-alone broadband connection is undoubtedly based upon their attempts to undermine the viability of the third-party dependent VoIP provider. Since the time the Commission considered this matter, however, the FCC has approved the proposed SBC – AT&T merger. In that order, the FCC approved a merger condition offered by SBC to provide naked DSL. Consistent with the previously discussed hesitation of ILECs to provide such a service, SBC only offered to provide this service for two years. As such, the viability of such third-party dependent VoIP providers is still very much in doubt.

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Conclusion: In order to adequately understand the state of competition in an exchange it is important to examine the market share of SBC as compared to its competitors. In the most recent SBC effective competition case which was heard earlier this year, none of the exchanges in this case had significant market share from any other "competitor". Without a fair existing competitive environment, granting competitive status is more likely to hurt competition than to aid it.

As the above discussion indicates, the majority's reliance upon the SBC recital of various competitors is misplaced. SBC's argument, that the loss of access lines to such competitors is indicative of competition, is weak at best. These access lines were not necessarily lost to anyone. A significant number of access line losses may merely reflect the transition of dual lines for dial-up internet access to a single broadband connection. None of the competitors in this case, either singularly or as a group, present the ability to prevent SBC's exercise of market power once granted. Furthermore, there is evidence that SBC has such substantial market power in the exchanges in question that price discipline will only occur at the whim of SBC. As such, this grant of competitive classification is harmful to the ratepayer and, under any definition, contrary to the public interest. As such, we dissent from the majority's Report and Order.

**In the Matter of the Application of Kansas City Power & Light
Company for Authority to Issue Debt Securities.**

*Case No. EF-2005-0498
Decided November 3, 2005*

Electric §38. The Commission approved KCPL's request to issue up to \$635 million of debt securities. KCPL needed that financing to pay for the investments it agreed to make in its experimental regulatory plan, which the Commission approved in a separate case.

ORDER APPROVING FINANCING

On June 22, 2005, Kansas City Power & Light Company (KCPL) filed its Application for authority to issue certain debt securities and to enter into Interest Rate Hedging Instruments. KCPL seeks the Commission's authority to:

- (a) issue up to \$635 million principal amount of debt securities through December 31, 2009, into interest in which may take the form of secured or unsecured senior or subordinated debt, "fall away" mortgage debt, or subordinated debt issued to special purpose financing entities, and with fixed or variable interest rates not to exceed 9% on fixed-rate notes or the initial rate on any variable rate or remarketed notes;
- (b) to enter into interest rate hedging instruments with one or more counter parties in conjunction with the debt securities issued under this authorization; and
- (c) to execute all documents necessary for the issuance and take all other action necessary for the issuance and maintenance of the debt securities authorized in this proceeding.

KCPL notes that it is a signatory party to the Stipulation and Agreement in Case No. EO-2005-0329, and that Appendix B to that agreement outlines the Company's proposed financing plan for the 2005-2009 period. Thus, KCPL's application is directly related to KCPL's Experimental Regulatory Plan which the Commission approved on August 5, 2005, in Case No. EO-2005-0329. The Commission later approved amendments to that Plan on August 24, 2005.

On August 9, 2005, the Company submitted several late-filed exhibits in Case No. EF-2005-0498, one of which includes a statement of how the securities are to be sold. KCPL also filed revised *pro forma* financial statements as of March 31, 2005, giving effect to the transactions and accounting adjustments described in the Application.

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The Commission's Staff filed its Recommendation and Memorandum on August 31, 2005. Staff recommends that the Commission approve KCPL's proposed Financing Plan for the 2005-2009 period, relating to the KCPL Experimental Regulatory Plan filed and approved in Case No. EO-2005-0329, subject to the following conditions:

1. That the Company shall submit to the Financial Analysis Office of the Commission any information concerning deviations from the stated use of the funds or any information that would materially change the pro-forma capitalization and financial ratios.
2. That the interest rate for any debt issuance covered by the Application is not to exceed nine (9) percent.
3. That the Company shall submit to the Financial Analysis Office of the Commission any information concerning communication with credit rating agencies concerning these issuances.
4. That the Application is approved for the purposes stated in the Application and not for operating expenses.
5. That at no time are the Company's total borrowings, including all instruments, to exceed its regulated rate base.
6. That the Company shall submit to the Financial Analysis Department of the Commission the three key financial ratios discussed in the Stipulation and Agreement in Case No. EO-2005-0329 on a quarterly basis and after each issuance of long-term debt and/or common stock as defined in the Staff's Recommendation and in Appendix E-1 attached to the Stipulation and Agreement in Case No. EO-2005-0329.
7. That KCP&L shall file with the Commission within ten (10) days of the issuance of any debt securities authorized pursuant to this proceeding, a report including the amount of debt securities issued, date of issuance, interest rate (initial rate if variable), maturity date, redemption schedules or special terms, if any, use of proceeds, estimated expenses, portion subject to the fee schedule and loan or indenture agreement concerning each issuance. With regard to such debt, KCP&L shall abide by the conditions and restrictions set forth by the Federal Energy Regulatory Commission in its Order issued February 21, 2003, in Docket No. ES02-51-000.
8. That nothing in the Commission's order is to be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the Commis-

sion reserves the right to consider the rate making treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding.

No party filed an objection to Staff's Recommendation and Memorandum.

Based upon consideration of the verified application, and the recommendation of its Staff, the Commission determines that the Company's request is reasonable and not detrimental to the public interest. Accordingly, the Commission will approve the application subject to the conditions recommended by Staff.

IT IS THEREFORE ORDERED:

1. That Kansas City Power & Light Company is authorized to consummate the transactions contemplated in the application, subject to the conditions recommended by the Staff of the Commission and listed in the body of this order.
2. That nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions, and their results in cost of capital, in any later proceeding.
3. That this order shall become effective on November 13, 2005.

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., absent.

Ruth, Senior Regulatory Law Judge

In the Matter of the Application of Green Hills Telephone Corporation for Authority to Borrow an Amount Not to Exceed \$22,704,000 from the United States of America Acting through the Rural Utilities Service and the Rural Telephone Bank and in Connection Therewith to Execute a Loan Agreement, Promissory Note, and a Restated Mortgage Security Agreement and Financing Statement.*

*Case No. IF-2005-0506
Decided November 10, 2005*

Telecommunications §19. The Commission granted Green Hills Telephone Corporation's Motion to modify the Commission's previous order approving its financing to make clear that Green Hills could execute the debt instruments from the Rural Utilities Service and the Rural Telephone Bank as they were drafted.

ORDER GRANTING MOTION TO MODIFY ORDER

On October 13, 2005, the Commission issued its Order Approving Financing Application and Granting Protective Order approving the application of Green Hills Telephone Corporation to borrow funds and pledge its assets as security for the loan. On October 17, 2005, Green Hills filed a motion requesting that the order be modified.

Since the time that Green Hills applied for funds from the Rural Utilities Service and the Rural Telephone Bank, it has determined that it will not make all the improvements originally contained in the \$22,704,000 request. Green Hills also determined that it had sufficient internally generated revenues available for use in making these improvements. Thus, Green Hills has decided that it needs to draw down only \$9,500,000.

Because of the difficulty and time involved in revising the loan documents, Green Hills requests that the Commission modify its order so that it is clear that Green Hills has the authority to execute the Loan Agreement and Promissory Notes for \$22,704,000 even though it only intends to draw down \$9,500,000. Green Hills also requests that the order be modified to make it clear that Green Hills has the authority to place a lien on its property.

The Staff of the Missouri Public Service Commission responded on October 19, 2005. Staff recommended that the modifications be granted. No other responses were received.

The Commission has reviewed the pleadings and finds that its previous order shall be modified as requested. All the conditions of the Commission's previous order shall continue to apply.

* See page 113 for another order in this case.

IT IS THEREFORE ORDERED:

1. That the Motion to Modify Order Approving Financing is granted.
2. That the Order Approving Financing and Granting Protective Order issued on October 13, 2005, is readopted with the additional ordered paragraphs set out below.
3. That Green Hills Telephone Corporation is authorized to execute and deliver such instruments and to undertake such other acts as are necessary to consummate the financing transaction as presented in the application and described in the Order Approving Financing and Granting Protective Order. This authorization includes the execution of documents to borrow an aggregate amount not to exceed \$22,704,000 from the Rural Utilities Service and the Rural Telephone Bank subject to the requirements of the Order Approving Financing, including a limit on the portion of this debt that the Green Hills Telephone Corporation may draw upon without further application to the Commission.
4. That Green Hills Telephone Corporation is authorized to draw down and obtain debt proceeds as provided in this order and the Order Approving Financing in an aggregate principal amount up to \$9,500,000 through mortgage notes payable under terms and conditions as described in the application, in this order, and in the Order Approving Financing.
5. That Green Hills Telephone Corporation is hereby authorized to execute and deliver a Restated Mortgage, Security Agreement and Financing Statement for the purpose of placing a lien on its assets as well as to perform such other lawful acts as may be necessary to complete the transaction herein approved.
6. That Green Hills Telephone Corporation shall apply to the Commission for approval to draw down more than \$9,500,000.
7. That this order shall become effective on November 20, 2005.

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., absent.

Dippell, Senior Regulatory Law Judge

In the Matter of the Application of The Oregon Farmers Mutual Telephone Company for Authority to Execute a Secured Guaranty in Favor of the Rural Telephone Finance Cooperative in Connection with a Loan to Northwest Missouri Holdings, Inc.

Case No. TF-2005-0503
Decided November 10, 2005

Telecommunications §19. The Commission authorized an incumbent local exchange carrier to execute a secured guaranty relating to a previously approved financing transaction.

ORDER GRANTING APPLICATION

On June 24, 2005, The Oregon Farmers Mutual Telephone Company filed an application asking the Commission for authority to execute a Secured Guaranty in favor of the Rural Telephone Finance Cooperative (RTFC). The application explains that Oregon Farmers provides basic local telecommunications service to approximately 1,271 customers in one exchange located in Holt County, Missouri. All outstanding stock of Oregon Farmers is owned by Northwest Missouri Holdings, Inc.

The Commission authorized Northwest Missouri Holdings to purchase the stock of Oregon Farmers in Case No. IM-2004-0461. In that same case, Oregon Farmers was authorized to execute and deliver a Deed of Trust, Security Agreement, and Financing Statement placing a lien on its assets in order to secure a loan from the RTFC to Northwest Missouri Holdings in the amount of \$7,388,889. The RTFC has now requested that Oregon Farmers execute a Secured Guaranty to serve as additional security for the RTFC loan to Northwest Missouri Holdings. It is for the execution of this Secured Guaranty that Oregon Farmers seeks the Commission's approval.

On August 31, the Commission's Staff filed a Recommendation and Memorandum regarding Oregon Farmers' application. Staff's memorandum explains that the Secured Guaranty that the RTFC has asked Oregon Farmers to sign is actually a part of the original loan documentation required by the RTFC at the time of the original transaction. Oregon Farmers did not request authority from the Commission to sign that Secured Guaranty at that time, so it is requesting that authority now. Staff indicated that if Oregon Farmers does not sign the Secured Guaranty, the interest rate on the loan will be increased. By signing the Secured Guaranty, Oregon Farmers would decrease its interest costs over the remaining fourteen-year life of the loan. Staff recommended that the Commission approve the application.

The Commission initially considered Oregon Farmers' application at its September 8 agenda meeting. After discussing the application, the Commission found that it had questions about the Secured Guaranty. In order to put those questions to the parties, the Commission conducted an on-the-record presentation on September 20.

Oregon Farmers, Staff, and the Office of the Public Counsel were represented at the on-the-record presentation by counsel. Pat Eudy, President of Oregon Farmers, and John Kiebel and Matt Barnes of Staff offered sworn testimony regarding the details of the application and the Secured Guaranty. In addition, Oregon Farmers and Staff filed written memoranda following the on-the-record presentation.

The testimony indicated that the Secured Guaranty, for which Oregon Farmers is seeking approval in this case, was actually a part of the loan package for which Oregon Farmers was given approval in Case No. IM-2004-0461 as a transfer of property under Section 392.300.1, RSMo 2000. As a result of miscommunication between counsel and the company, Oregon Farmers neglected to seek separate approval of the Secured Guaranty as an "evidence of indebtedness" under Section 392.310.1, RSMo 2000. The RTFC still wants the additional protection afforded by the Secured Guaranty and for that reason, Oregon Farmers filed a new application to obtain the Commission's approval for the issuance of the Guaranty.

The Commission also questioned how the Secured Guaranty differed from the security interest that the RTFC obtained in the assets of Oregon Farmers in the transaction approved in the earlier case. Oregon Farmers explained that while the assets of Oregon Farmers have already been pledged to the RTFC to secure the debt of Oregon Farmers' corporate parent, Northwest Holdings, Inc., Oregon Farmers, by signing the Secured Guaranty, is obligating itself to pay that debt if Northwest Holdings does not do so.

Based on representations from the company, Staff's recommendation indicated that Oregon Farmers would face a 200 basis point increase in the interest rate that it must pay on the RTFC loan if it does not sign the Secured Guaranty. In its Legal Memorandum, Oregon Farmers indicated that after reviewing the language of the Loan Agreement it has concluded that the increase in the interest rate that would result from its failure to sign the Secured Guaranty would be 50 basis points rather than 200 as previously indicated.

The Commission has reviewed and considered Oregon Farmers' application, the Recommendation and Memorandum of Staff, as well as the evidence presented at the on-the-record presentation. The Commission concludes that the Secured Guaranty, the issuance of which Oregon Farmers asks the Commission to approve, is essentially a part of the transaction for which the Commission granted its approval in Case No. IM-2004-0461. There is no reason to revisit that case. Signing the additional guaranty will reduce the interest charges that Oregon Farmers will have to pay over the life of the previously approved loan. Furthermore, signing the additional guaranty does not appreciably increase the risk undertaken by Oregon Farmers and will not result in any harm to Oregon Farmer's ratepayers. Therefore, the Commission will approve Oregon Farmers' application for authority to enter into a Secured Guaranty relating to the previously approved transaction.

IT IS THEREFORE ORDERED:

1. That The Oregon Farmers Mutual Telephone Company's Application is granted.
2. That The Oregon Farmers Mutual Telephone Company is authorized to enter into and perform in accordance with the terms of the Secured Guaranty attached to its Application.

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3. That The Oregon Farmers Mutual Telephone Company is authorized to do any and all other things as may be reasonably necessary in furtherance of all acts specifically authorized by this order.

4. That nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions, and their results in cost of capital, in any later proceeding.

5. That this order shall become effective on November 20, 2005.

Davis, Chm., Clayton and Appling, CC., concur

Gaw, C., dissents

Murray, C., absent

Woodruff, Senior Regulatory Law Judge

**In the Matter of a Further Investigation of the Metropolitan
Calling Area Service After the Passage and Implementation
of the Telecommunications Act of 1996.***

*Case No. TO-2001-391
Decided November 29, 2005*

Telecommunications §34. The Commission instructed the task force to investigate issues related to the pricing of MCA service and the effects of an expanded MCA on pricing.

ORDER CLOSING CASE

On January 18, 2001, the Commission issued an order establishing a new case and creating an industry task force to consider the Metropolitan Calling Area Plan (MCA) service in the St. Louis, Kansas City, and Springfield metropolitan areas. The Commission instructed the task force to investigate issues related to pricing of MCA service, the effects of an expanded MCA on pricing, and whether the Local Exchange Routing Guide (LERG) is the appropriate mechanism to identify the MCA NXX codes in the future. The Commission also asked the task force to bring to the Commission's attention any other issues it identifies that may impact MCA services and its continued viability in the future.

The Task Force filed its Final Task Force Report on January 24, 2002. In the Report, the Commission's Staff recommended that, among other things, the Commission order the implementation of Staff's proposed MCA-2 plan. MCA-2 is a proposed one way outgoing calling plan that would enable mandatory and optional tier MCA subscribers to call all telephone numbers within the MCA geographic area, regardless of whether or not the called party also participates in the MCA plan. The MCA-2 plan did not receive unanimous support from the Task Force participants.

The Commission conducted an On-the-Record Presentation on July 15, 2002, and held a prehearing conference on November 24, 2003. To date, the Commission has declined to adopt Staff's proposed MCA-2 plan or to pursue the other issues raised by the parties. Instead, the Commission issued, on March 18, 2004, an order establishing a new task force or working group to investigate whether, and if so, what type, of changes should be made to the Metropolitan Calling Area Plan and to calling scopes in Missouri in general. The Task Force filed its Final report in Case No. TW-2004-0471 on September 29, 2004. In response to that Report, the Commission opened a rulemaking case, Case No. TX-2005-0194, regarding applications for expanded calling scopes. The final rule was published in the *Code of State Regulations* on September 30, 2005. The Commission also has the following pending cases involving applications for expanded calling scope:

* See pages 406, 437 and 460, Volume 12 MPSC 3d for orders in Case No. TW-2004-0471.

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- TO-2003-0257, In the Matter of the Request from the Customers in the Rockaway Beach Exchange for an Expanded Calling Scope to Make Toll-Free Calls to Branson;
- TO-2005-0141, In the Matter of a Request for Expansion of the St. Louis Metropolitan Calling Area Plan to Include the Exchanges of Washington, Union, Wright City, St. Clair, Marthasville, Beaufort, Foley, and Warrenton;
- TO-2005-0143, In the Matter of a Request for Modification of the Springfield Metropolitan Calling Area Plan to Make the Ozark Exchange a MCA Tier 1 Exchange; and
- TO-2005-0144, In the Matter of a Request for the Modification of the Kansas City Metropolitan Calling Area Plan to Make the Greenwood Exchange Part of the Mandatory MCA Tier 2.

The Commission appreciates the time and effort its Staff and the other parties have invested in this case. The Commission finds that Case No. TO-2001-391 has served its purpose and may now be closed. The Commission notes that the record in Case No. TO-2001-391 may be useful in pending or future cases.

IT IS THEREFORE ORDERED:

1. That Case No. TO-2001-391 may be closed effective December 10, 2005.
2. That this order shall become effective on December 9, 2005.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Ruth, Senior Regulatory Law Judge

In the Matter of the Tariff Sheets Filed by Southwestern Bell Telephone, L.P., Doing Business as SBC Missouri, in Order to Change its Fictitious Name to AT&T Missouri.

Case No. IN-2006-0232
Decided December 12, 2005

Telecommunications §1. Southwestern Bell Telephone doing business as SBC Missouri, filed certain proposed tariff sheets intended to change its fictitious name to AT&T Missouri. The Commission reviewed these documents and found that the change of name should be recognized.

**ORDER RECOGNIZING NAME CHANGE,
APPROVING TARIFF AND CLOSING CASE**

On November 29, 2005, Southwestern Bell Telephone L.P., doing business as SBC Missouri, filed certain proposed tariff sheets intended to change its fictitious name to AT&T Missouri. The proposed tariff sheets bear a proposed effective date of December 29, 2005.

Pursuant to the Commission's order of December 6, the Staff of the Missouri Public Service Commission filed its Memorandum and Recommendation on December 9, stating that it had reviewed Southwestern Bell's proposed tariff sheets and supporting documents and advising the Commission to approve the sheets and recognize the change of fictitious name.

The Commission has reviewed Southwestern Bell's proposed tariff sheets and supporting documents, as well as Staff's recommendation, and finds that the change of fictitious name should be recognized. The Commission further finds that the proposed tariff sheets should be approved.

IT IS THEREFORE ORDERED:

1. That the change of the fictitious name of Southwestern Bell Telephone L.P. from "SBC Missouri" to "AT&T Missouri" is recognized.
2. That the tariff sheets filed by Southwestern Bell Telephone L.P. on November 29, 2005, Tariff File Nos. JI-2006-0396 through JI-2006-0406, are approved for service rendered on and after December 29, 2005. The tariff sheets approved are:

PSC Mo. No. 17

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 24

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

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PSC Mo. No. 26

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 27

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 29

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 35

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
3rd Revised Title Sheet 1, Replacing 2nd Revised Title Sheet 1

PSC Mo. No. 36

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
5th Revised Title Sheet 1, Replacing 4th Revised Title Sheet 1

PSC Mo. No. 38

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 40

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 41

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

PSC Mo. No. 42

2nd Revised Adoption Notice Sheet 1, Replacing 1st Revised Adoption Notice Sheet 1
2nd Revised Title Sheet 1, Replacing 1st Revised Title Sheet 1

3. That this order shall become effective on December 29, 2005.
4. That this case may be closed on December 30, 2005.

Kevin A. Thompson, Deputy Chief Regulatory
Law Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

In the Matter of Proposed Emergency Amendment to Commission Rule 4 CSR 240-13.055.*

*Case No. GX-2006-0181
Decided December 13, 2005*

Gas §2. This Emergency Amendment provides additional repayment plans for residential users of natural gas for heating purposes. During the winter gas prices are high and many people cannot afford to heat their homes. This rule sets up the obligations placed upon the utility company.

Gas §29. The cost of compliance with this rule shall not include any lost revenues or other costs associated with the gas utility's agreement to temporarily waive or suspend reconnection fees or deposit requirements otherwise applicable to customers who were qualified for financial assistance under the Low-Income Heating Energy or Assistance Program. No gas utility should be allowed to recover costs under this subsection that would have been incurred in the absence of this emergency rule.

Gas §51. Late payment charges shall not be assessed except with respect to failure to make timely payments under the payment plan; and the gas utility shall not charge customers interest on the account balance for any deferral period.

**ORDER APPROVING
EMERGENCY AMENDMENT**

On October 21, 2005, the Office of the Public Counsel petitioned the Commission to open the above-captioned case. On October 25, 2005, the case was opened. Written comments were received, a technical conference was held on November 10, 2005, and a hearing was held on December 2, 2005.

The Commission has determined that an emergency exists, necessitating an emergency amendment to 4 CSR 240-13.055 Cold Weather Maintenance of Service: Provision of Residential Heat-Related Utility Service During Cold Weather. Further the Commission has reviewed the various proposals for amendment language, and finds that the language attached hereto as "Attachment A" is reasonable and appropriate under the circumstances.

IT IS THEREFORE ORDERED:

1. That the language attached hereto as "Attachment A" shall be submitted to the Secretary of State for filing as an emergency amendment to 4 CSR 240-13.055.

2. That this Order shall become effective December 16, 2005.

Davis, Chm., Gaw, Clayton, and

Appling, CC., concur.

Murray, C., dissents, with separate
dissenting opinion attached.

*The Commission, in an order issued on December 15, 2005, denied applications for rehearing in this case. This case was appealed to the Cole County Circuit Court (05ACCC01138) and then to the Missouri Court of Appeals Western District (WD66666).

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Today, the Commission issued an Order finding it necessary to file an emergency amendment to our “Cold Weather Rule”¹ in order to address the record high prices for natural gas. I must dissent from this Order because I disagree that any necessity has been shown for an emergency amendment.

Much publicity has been given to the fact that natural gas prices have soared to record highs this year. The Commission itself has made attempts to advise the public that they need to take steps to winterize their homes and cut energy costs. We allow local distribution companies (“LDCs”) to file purchased gas adjustment tariffs to pass these costs through to their customers. These LDCs do not make a profit from the sale of natural gas itself, so they must be allowed to pass the costs through to customers in order to cover their expenses.

I do not dispute the fact that it will be difficult for many Missourians to pay their natural gas heating bills this winter. I do not, however, believe that additional amendments to the Cold Weather Rule will provide any more assurance that these events will be avoided. I believe that these amendments will eventually place even more of a burden on ratepayers – both those that have trouble paying their bills, and those who pay their bills despite the additional burdens.

The existing Cold Weather Rule has recently been through close review and amendment.² Nothing in the pleadings in this case or in the evidence submitted at the hearing indicates that the current Cold Weather Rule is inadequate to address the needs of Missourians. Instead, the focus of the evidence points to the crisis of this year’s high natural gas rates. I believe the evidence is lacking in establishing the need for emergency amendments when no deficiencies in the current rule have been shown.

Even the Commission’s staff found that most provisions of the existing Cold Weather Rule, along with the voluntary steps agreed to by our LDCs,³ would be sufficient to meet the needs of customers during this winter heating season. Staff suggested a few small tweaks to the existing rule, but did not endorse the overkill suggested by Public Counsel.

The cause that the Office of Public Counsel sites for this “emergency” – that natural gas prices are at record high levels – has been reported in the media and been an issue before the Commission for months now. Yet Public Counsel waited to file its request to address this issue ten days prior to the November 1 onset of the winter heating session. There is no explanation as to why Public Counsel was unable to make its request for amendment to the Cold Weather Rule on a more timely basis – in time to allow the Commission and the parties to really vet the issues before them, rather than make radical changes that have had little time for discussion and review. Emergency amendments lack the traditional due process requirements of rule-making and should not be pursued unless there is clear and convincing evidence of the need for such actions.

¹ 4 C.S.R. 240-13.055.

² See Case No. GX-2004-0492; rule amendments effective on October 30, 2004.

³ As noted in the media, Governor Matt Blunt negotiated an agreement with the Local Distribution Companies to address concerns that Missourians would have their heat cut off. These included some of the measures in the amendment to the Cold Weather Rule.

Without time for discussion and review, it is unlikely that the consequences of these drastic measures have been thought through. Missouri residents who are already behind on their natural gas utility payments are only going to get further behind because of the provisions of this rule. Next winter, when the next “crisis” occurs, as it apparently has for three of the last four winters,⁴ these same people will be so far in arrears as to never get out. This result will increase utility bad debt accounts. In the end, this will hurt all Missouri consumers of natural gas, as they will be asked to cover those same bad debts through increases in their rates. This, in my opinion, amounts to a hidden tax on Missourians that they have no representation or voice in, because Public Counsel has unilaterally decided that Missourians who are able to pay their natural gas bills have the social obligation to supplement those who cannot, or will not.

And if we determine that the LDCs cannot recover these losses from other ratepayers, as suggested by amendments to the Cold Weather Rule, we may affect the credit rating and potentially the solvency of these companies. This too will increase overall rates, because the costs of the LDCs will soar, requiring additional rate increases.

Finally, I am concerned that the recovery mechanism that is included in the emergency amendments will be insufficient to withstand judicial review. The emergency amendments in this case are similar to ones that were put into place in 2001 when natural gas prices set records then.⁵ These same changes were stayed by the Circuit Court of Cole County because the cost recovery mechanism (the same one suggested in the current case) was deemed inadequate by the court to compensate the LDCs for the reductions in revenue, income and achieved returns resulting from the emergency amendment.⁶ While it is doubtful that any of the LDCs will challenge the emergency amendments in this case because of internal and external pressures to reach an agreement, the Commission should be concerned that the proposed cost recovery mechanism is inadequate.

I would suggest that we establish a process that addresses these issues on a broad basis, and that would determine whether there really is a social need that must be addressed. This process should require that state and local governments come to the plate with ideas for explicit funding mechanisms to address the need; not funding hidden within utility rates.

For the foregoing reasons, I must dissent to the Commission's Order of Necessity to file emergency amendments to 4 CSR 240-13.055.

⁴ I find it interesting that we keep having these repeated “crises” in winter heating costs. The point of the 2004 amendments to the Cold Weather Rule was to address these problems before they became a crisis. Again, there is no evidence that those amendments were not adequate.

⁵ See Case No. AX-2002-0203.

⁶ See Stay Order in Case No. 10CV325865, consolidated with Case No. 01CV325866 In the Circuit Court of Cole County, Missouri (November 27, 2001).

**In the Matter of AT&T Communications of the Southwest, Inc.'s
Proposed Tariff to Establish a Monthly Instate Connection
Fee and Surcharge.***

*Case No. TT-2002-0129, et al.
Decided December 13, 2005*

Telecommunications §7. Competitive telecommunications companies are not subject to rate of return regulation and the Commission has no authority to regulate the competitive rates that they will charge their customers based on the companies' costs or the amount of profits they will make.

Telecommunications §14. The Commission denied Public Counsel's motions to suspend tariffs designed to implement Instate Access Recovery Fees by competitive long distance carriers.

Telecommunications §14. Section 392.200.1, RSMo, which requires that rates be just and reasonable, no longer applies to rate changes made by competitive companies. Instead the legislature has determined that competition will ensure that the rates charged by competitive companies will be just and reasonable.

Telecommunications §14. The monthly instate recovery fees included in the challenged tariffs do not improperly discriminate against any Missouri customer.

Telecommunications §40. The intrastate long distance market in Missouri is highly competitive.

Appearances

Brett D. Leopold and Kenneth A. Schiffman, 6450 Sprint Parkway, Overland Park, Kansas 66251, for Sprint Communications Company, L.P.

Kevin K. Zarling, AT&T Communications of the Southwest, 919 Congress, Suite 900, Austin, Texas 78701, and *Mark W. Comley*, Newman Comley & Ruth P.C. 601 Monroe Street, Suite 301, Jefferson City, Missouri 64111, for AT&T Communications of the Southwest, Inc.

Carl J. Lumley and Leland B. Curtis, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 S. Bemiston, Suite 200, St. Louis, Missouri 63015, for MCI Communications Services, Inc. and Teleconnect Long Distance Services and Systems Company.

Michael F. Dandino, Senior Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

David A. Meyer, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission

REGULATORY LAW JUDGE: Morris L. Woodruff, Senior Regulatory Law Judge

*This order contains a correction approved by the Commission in an order issued on December 14, 2005. On January 10, 2006, the Commission issued an Order Denying Motion for Rehearing in this case. This case was appealed to Cole County Circuit Court (06AC-CC00080) and then to the Missouri Court of Appeals (WD68333). See page 440, Volume 10, MPSC 3d and page 5, Volume 11, MPSC 3d for other orders in this case. Also see page 522, Volume 11, MPSC 3d for an order in XT-2003-0047 and page 406, Volume 11, MPSC 3d for an order in TT-2002-1136.

REPORT AND ORDER

Syllabus: This report and order denies motions filed by the Office of the Public Counsel to reject tariff filings made by several long distance telecommunications companies to create, or increase the amount of, instate access recovery fees and surcharges for certain long distance customers.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

This consolidated case concerns five separate tariffs filed by AT&T Communications of the Southwest, Inc. (Case No. TT-2002-129); MCI WorldCom Communications, Inc. (Case Nos. XT-2003-0047 and LT-2004-0616); Teleconnect Long Distance Services and Systems Company, a MCI WorldCom Company d/b/a TelecomUSA (Case No. XT-2004-0617); and Sprint Communications Company, L.P. (Case No. TT-2002-1136). At various times in 2001, 2002, and 2004, the companies filed tariffs that implemented or increased an instate access recovery charge to be added to customer bills for long distance toll service. In response to each tariff filing, the Office of the Public Counsel filed a motion asking the Commission to suspend the tariff, conduct an evidentiary hearing and ultimately reject the tariff. The Commission denied Public Counsel's motions to suspend and allowed the in-state access recovery charge tariffs to go into effect.

Public Counsel appealed the Commission's decision in each case to the Circuit Court of Cole County. The first three cases to be appealed – TT-2002-129, TT-2002-1136, and XT-2003-0047 – were consolidated on appeal. On June 27, 2003, the circuit court ruled in favor of the Commission. Public Counsel appealed, however, and on August 10, 2004, the Missouri Court of Appeals for the Western District reversed that ruling and ordered the cases remanded to the Commission for further action.¹

In reversing the Commission's decisions to approve the tariffs, the Court of Appeals held that the Commission had failed to make sufficient findings of fact and conclusions of law to justify its orders. The Court of Appeals remanded the cases and directed the Commission to make findings of fact and conclusions of law. The Court of Appeals indicated that on remand the Commission could reopen the case and hear additional evidence. Otherwise it could make the required findings of fact and conclusions of law based on the evidence already presented.²

¹ *State ex rel. Coffman v. Public Service Commission*, 150 S.W.3d 92 (Mo. App. W.D. 2004)

² *Id.* at 102.

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The two later cases – LT-2004-0616 and XT-2004-0617 – had also been appealed to the Circuit Court of Cole County, but the circuit court had not yet issued a decision on them when the Court of Appeals entered its decision remanding the three earlier cases. Thereafter, on February 22, 2005, acting on a stipulation of the parties, the Circuit Court of Cole County ordered that those two cases also be remanded to the Commission for further consideration.

Acting on remand, the Commission consolidated the five tariff cases and established a procedural schedule for the submission of evidence in the form of prefiled testimony. Witnesses on behalf of each of the parties submitted testimony. In a unanimous stipulation and agreement that was approved by the Commission on August 25, the parties agreed that all submitted testimony should be admitted into evidence. In that same document, the parties waived their right to cross examine the witnesses that offered testimony. As a result, no hearing was held. The parties submitted initial briefs on October 7, reply briefs on November 3, and proposed findings of fact and conclusions of law on November 14.

AT&T and Its Tariff

AT&T is a competitive interexchange and local exchange telecommunications company authorized to provide telecommunications services in Missouri. All of the services that it offers in Missouri are classified as competitive, except for exchange access service.

AT&T initially filed a tariff creating an instate connection fee on August 14, 2001. The fee was set at \$1.95 per month, and applied to all AT&T consumer accounts except those with monthly spending under \$1.00, as well as customers of AT&T Digital Phone Service, AT&T Digital Broadband, AT&T Long Distance Lifeline Program, and customers under the AT&T Price Protection Plan.³ After initially suspending that tariff, the Commission approved it to become effective on December 22, 2001. AT&T actually started billing its customers for the fee in the spring of 2002.⁴

Subsequently, in a tariff filed November 15, 2004, AT&T modified its instate connection fee by increasing the fee to \$2.49 per month and applying the fee to all of its long distance customers except those customers in AT&T's Lifeline Program, and those who have AT&T Local Phone Service. That tariff was not challenged and went into effect on December 15, 2004.⁵ The fee appears as a separate line item on AT&T's bill to its customers.⁶

Sprint and Its Tariff

Sprint is a competitive interexchange and local exchange telecommunications company authorized to provide telecommunications services in Missouri. Sprint also provides services as an incumbent local exchange carrier in portions of Missouri.

³ Rhinehart Direct, Exhibit 1, page 4, lines 7-15.

⁴ Rhinehart Direct, Exhibit 1, page 4, lines 16-17.

⁵ Rhinehart Direct, Exhibit 1, page 5, lines 3-9.

⁶ Rhinehart Direct, Exhibit 1, page 6, lines 17-18.

Sprint initially filed a tariff creating an instate access recovery charge on May 30, 2002. The fee was set at \$1.99 per month, and applied to all of Sprint's residential long distance customers, except those that purchased local service from a Sprint company.⁷ After initially suspending that tariff, the Commission approved it to become effective on July 31, 2002. Sprint's instate access recovery charge remains in effect and appears as a separate line item on Sprint's bill to its customers.

MCI, Teleconnect, and Their Tariffs

MCI is a competitive interexchange and local exchange telecommunications company authorized to provide telecommunications services in Missouri. Teleconnect, a subsidiary of MCI, is a competitive interexchange company authorized to provide telecommunications services in Missouri. All of the services that they offer in Missouri are classified as competitive, except for exchange access service.

MCI initially filed a tariff creating an instate access recovery fee on August 3, 2002. The fee was set at \$1.95 per month, and applied to all MCI residential customer accounts except those with monthly spending under \$1.00. MCI also indicated that the fee is not charged to customers who obtain local telephone service from MCI.⁸ The Commission denied Public Counsel's motion to suspend that tariff and instead approved it to become effective on September 3, 2002.

Subsequently, Teleconnect filed a tariff to implement an instate access recovery fee. That tariff was not challenged and went into effect on December 1, 2002.

In the spring of 2004, MCI and Teleconnect filed tariffs to increase their instate access recovery fees by \$1.00 per month. Public Counsel moved to suspend those tariffs, but, after period of suspension, the Commission approved those tariffs to become effective on August 1, 2004. MCI's and Teleconnect's instate access recovery charges remain in effect and appear as a separate line item on their bills to their customers.

Instate Access Recovery Fees

All of the long distance carriers indicate that the purpose of the instate access recovery fees is to recover a portion of what they believe to be excessive switched access charges levied on them in Missouri by incumbent, as well as competitive, local exchange companies. Switched access charges are imposed on long distance carriers by local exchange companies as the price for originating and terminating long distance calls on the local facilities that serve the end use customer. Switched access charges vary between local phone companies, but in general, the rates charged by Missouri companies are higher than such rates in other states.⁹ In fact, Missouri currently has the third highest average intrastate originating plus terminating switched access charges in the nation, trailing only South Dakota and New Mexico. Missouri intrastate access rates are almost three times the nation-wide intrastate average.¹⁰

⁷ Appleby Direct, Exhibit 3, page 10, lines 21-22.

⁸ Graves Amended Direct, Exhibit 5, page 19, lines 17-19.

⁹ Graves Amended Direct, Exhibit 5, page 16, lines 10-19.

¹⁰ Rhinehart Surrebuttal, Exhibit 2, page 13, lines 14-19.

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Each of the long distance service providers whose tariffs have been challenged in these cases also offers local phone service to Missouri customers. When these providers complete a long distance call to one of their local customers, or originate such a call for one of their local customers, they avoid having to pay either originating or terminating access charges for completion of that call, thereby reducing their costs.¹¹

Competition For Long Distance Service

The intrastate long distance market in Missouri is highly competitive. Many companies offer such services in Missouri.¹² In addition to companies that offer long distance service over land line connections, consumers can also choose to obtain their long distance service from a wireless carrier or from a VOIP (voice over internet) provider.¹³ Consumers can compare rates offered by various providers, and if unhappy with the price they pay to receive long distance service, can obtain such service from another company.

Furthermore, the competitive long distance providers offer other long distance plans that do not include a monthly instate cost recovery fee. For example, AT&T offers a plan called One Rate Simple that does not include a monthly fee. That plan recovers AT&T's costs through a higher per minute charge compared to the much lower per minute charges offered under plans that include the monthly fee.¹⁴ In addition, if a consumer does not wish to pay a monthly fee, they have the option of choosing not to pre-subscribe to a long distance carrier, and instead use a dial-around toll service or a prepaid service for their long-distance needs.¹⁵

The Cost of Service to Business and Residential Long Distance Customers

For many years telecommunications companies have placed business and residential long distance customers into different customer classes.¹⁶ The long distance providers market their services to those classes of customers differently.¹⁷ That means that business customers pay different rates for services than do residential customers. Generally, business customers pay more for the services they receive than do residential customers. In fact, business customers pay as much as two and a half times more for basic local telephone service than do residential customers.¹⁸ Business customers also generally pay higher per minute rates for long distance service than do residential customers.¹⁹

There are also differences between the cost for switched access that a long distance carrier will incur for service to the class of business customers and for

¹¹ Rhinehart Direct, Exhibit 1, page 15, lines 1-8.

¹² Graves Amended Direct, Exhibit 5, page 10, lines 16-26.

¹³ Graves Amended Direct, Exhibit 5, page 11, lines 11-16.

¹⁴ Rhinehart Direct, Exhibit 1, page 5, lines 10-17.

¹⁵ Appleby Direct, Exhibit 3, page 10, lines 10-15.

¹⁶ Rhinehart Surrebuttal, Exhibit 2, page 27, lines 16-20.

¹⁷ Rhinehart Surrebuttal, Exhibit 2, page 27, lines 20-22.

¹⁸ Voight Surrebuttal, Exhibit 8, page 3, lines 5-7.

¹⁹ Rhinehart Surrebuttal, Exhibit 2, page 28, lines 4-18.

service to the class of residential customers. AT&T's witness Daniel Rhinehart convincingly explained those differences in great detail in his surrebuttal testimony.²⁰ That testimony need not be repeated in this report and order.

The long distance carriers also incur different switched access costs depending upon whether they are serving a stand-alone long distance customer, or a customer who also takes local exchange services from the long distance carrier. When the long distance carrier operates solely as an interexchange carrier, it must pay both originating and terminating switched access charges. However, if it also provides local exchange service to a long distance customer, it can avoid paying either terminating or originating access charges for calls made by, or completed to, that customer.²¹

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

AT&T, Sprint, MCI, and Teleconnect are Telecommunications Companies as that term is defined by Section 386.020(51), RSMo Supp. 2005. As such, they are subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000. In addition, each of the companies is a Competitive Telecommunications Company as that term is defined by Section 386.020(9), RSMo Supp. 2005, having been so classified by the Commission pursuant to Section 392.361, RSMo 2000.

Section 392.200.1, RSMo Supp. 2005 provides as follows:

Every telecommunications company shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order or decision of the commission is prohibited and declared to be unlawful.

If this section applies, then the charges contained in the challenged tariffs must be "just and reasonable."

The relevant portion of Section 392.200.2, RSMo Supp. 2005, provides as follows:

No telecommunications company shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered

²⁰ Rhinehart Surrebuttal, Exhibit 2, pages 25-26, lines 16-34, 1-31.

²¹ Rhinehart Direct, Exhibit 1, page 15, lines 1-8. See also, Graves Amended Direct, Exhibit 5, page 20, lines 3-12.

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or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions.

Section 392.200.3, RSMo Supp. 2005, provides as follows:

No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

These sections prohibit undue or unreasonable prejudice or disadvantage. They permit different treatment for different classes of customers and require similar treatment of similarly situated customers. Public Counsel contends that the surcharges contained in the challenged tariffs fail to comply with the anti-discrimination provisions of these sections of the statute.

Section 392.200, RSMo, applies to all telecommunications companies – non-competitive as well as competitive. Section 392.500, however, establishes separate standards for the approval of rate changes proposed by competitive companies. At the time the Commission first considered these tariffs, that section explicitly made rate changes by competitive companies subject to the provisions of Section 392.200. However, in SB 237, enacted by the legislature in 2005, Section 392.500 was amended to provide that only subsections 2 to 5 of Section 392.200 would apply to rate changes made by competitive companies. Thus by direct implication, Section 392.200(1), which requires that rates be just and reasonable, no longer applies to rate changes made by competitive companies. Instead, the legislature has determined that competition will ensure that the rates charged by competitive companies will be just and reasonable.

In its decision remanding these cases to the Commission, the Court of Appeals found that, based on Section 392.500 as it existed at that time, the Commission had the discretion to require that the tariffs of competitive companies comply with the “just and reasonable” requirements of Section 392.200.1. That discretion has since been removed by the legislature. Nevertheless, it could be argued that the Court of Appeals’ finding that the Commission had the discretion to require the tariffs to comply with the “just and reasonable” requirements of Section 392.200.1 became the law of the case such as to require the Commission to decide that question on remand.

However, the doctrine of the law of the case is not absolute, and need not be applied where there has been a change of law after the appeal.²² Clearly, the law

²² *State of Missouri ex rel. Alma Telephone Co. v. Pub. Serv. Comm’n*, 40 S.W. 3d 381, 388 (Mo App. W.D. 2001).

has changed since the Court of Appeals' decision. Furthermore, the Commission's decision in this case can only be forward-looking; the Commission has no jurisdiction to require adjustment of the charges that have already been collected under the challenged tariffs.²³ Therefore, there is no reason to continue to apply to old law when considering the validity of these tariffs. As a result, the Commission does not need to decide whether the challenged tariffs comply with the "just and reasonable" requirements of Section 392.200.1.

Section 392.240.1, RSMo 2000, allows the Commission to determine whether the rates charged by a telecommunications company are just and reasonable based on whether those rates allow the company to earn a reasonable rate of return on its investments. That section is the basis for the traditional "rate of return" regulation that the Commission uses to regulate non-competitive companies. However, Section 392.361.5, RSMo 2000, gives the Commission the authority to suspend or modify the application of Section 392.240.1, as well as most other statutes contained within sections 392.200 to 392.340. The Commission has suspended the applicability of "rate of return" regulation under Section 392.240.1 for each of the competitive companies whose tariffs have been challenged in this proceeding.

DECISION

After applying the facts as it has found them to the applicable law, the Commission has reached the following decisions.

The parties agreed that these cases would be submitted to the Commission for decision on the following issue:

1. Based on the following sub-issues, should the Commission reject the AT&T, Sprint and MCI tariffs at issue in this case?
 - A. Should the Commission apply the provisions of subsection 392.200.1 to the AT&T, Sprint and MCI surcharges at issue, and if so, are the surcharges just and reasonable under subsection 392.200.1?
 - B. Do the AT&T, Sprint and MCI surcharges at issue comply with subsections 392.200.2 and 392.200.3, RSMo (2000)?

Application of Section 392.200.1, RSMo

The Commission previously concluded as a matter of law that Section 392.500 has been amended to provide that Section 392.200.1 does not apply to tariffs filed by competitive companies. Therefore, the Commission may not apply that subsection when considering any of the tariffs at issue in this case. Instead, the legislature has determined that competition will ensure that tariffs for competitive services provided by competitive companies will be just and reasonable. The Commission does not need to look beyond that legislative determination. Nevertheless, the Commission will examine the arguments that Public Counsel pre-

²³ *DeMaranville, et al. v. Fee Fee Trunk Sewer, Inc.*, 573 S.W. 2d 674, 676 (Mo. App. E.D. 1978).

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sents to support its contention that the surcharges are not just and reasonable.

In its initial brief, Public Counsel presents five arguments as to why the access recovery charges are unjust and unreasonable:

- (1) They apply even when customers have no instate calling;
- (2) The basis and method to establish the surcharges are based upon the variance between instate and interstate access rates that fails to consider the role of the Federal Subscriber Line Charge;
- (3) Residential customers bear the surcharge even though both residential and business customers cause the companies to incur access costs;
- (4) There is no reasonable basis based upon costs and the surcharges' purpose to exclude the companies' local service customers from the surcharge; and
- (5) Sprint's surcharge is based upon a methodology that relies on average national factors and fails to reflect Missouri costs based upon Missouri minutes of use.²⁴

Public Counsel's first argument complains that the surcharges could apply even when customers have no instate calling. That fact is true, but it does not indicate that the surcharge is in any way unjust or unreasonable. It merely indicates that the surcharges are flat rates.

Companies may choose to recoup their costs by charging all of their customers a flat rate that recovers an average cost, covering both high and low costs of providing service. Some customers will make more calls than others, thereby costing the companies more to serve those customers. A customer may make many calls in one month and few, or none, in the next month. Such flat rates have always been common in the telecommunications industry. For example, the monthly fee that local exchange companies charge their customers for local calling services is a flat rate. No party, including Public Counsel, suggests that all such flat rates are unreasonable, unlawful, or undesirable. Furthermore, since these flat rates are being charged by competitive companies for competitive services, the customer is free to seek services from another carrier if they do not want to pay a flat rate. Thus the fact that the access recovery fees in question are flat rates is not a basis for finding them to be unjust or unreasonable.

Public Counsel's second and fifth arguments are based on a contention that the companies improperly calculated the amount of the access recovery fees that they would charge their customers. Public Counsel seems to believe that the costs that the companies want to recover are not as high, or as unreasonable, as the companies claim. The assumption underlying the argument is that the companies have to justify the rates they charge based on the costs that they incur. However, these are competitive companies offering competitive services. They are not subject to rate of return regulation and the Commission has no authority to regulate the competitive rates that they will charge their customers based on the companies' costs or the amount of profits they will make.

²⁴ Public Counsel's Initial Brief, pages 3-4.

Public Counsel's third and fourth arguments relate to allegations that the access recovery fees are not just and proper because they unfairly discriminate against residential customers, and against customers who are not local services customers of the long distance carriers whose tariffs have been challenged. These arguments are closely related to the second issue and will be further addressed in relation to that issue.

The Commission concludes that the provisions of Section 392.200.1 do not apply to the tariffs for competitive services submitted by competitive companies that are challenged in this case. However, Sections 392.200.2 and .3 clearly do still apply to these tariffs and the Commission must determine whether the challenged tariffs comply with the anti-discrimination provisions of those statutes.

The Anti-Discrimination Provisions of Sections 392.200.2 and 392.200.3

There are two methods by which a long distance carrier could pass high intrastate access charges along to its long distance customers. The first would be to incorporate those charges into the per-minute rate charged by the long distance carrier to its customers. The other method would be to impose a flat monthly charge on the customer's bill. All of the long distance carriers whose tariffs have been challenged chose the second alternative and imposed a monthly surcharge on the bills they send to their customers.

In challenging the decisions to impose monthly surcharges to recover intrastate access charges, Public Counsel argues that the imposition of a flat monthly surcharge to recover a cost that varies with the amount of minutes used unjustly discriminates against some of the long distance carrier's customers.

In particular, Public Counsel contends that a flat surcharge is unfair to long distance customers that use only a few, or no, long distance minutes in a given month. In effect, such customers might be required to pay more per minute for long distance calling than would a customer that used many long distance minutes, and thus was able to spread the surcharge over a greater number of minutes.

This is essentially the same flat rate argument that Public Counsel raised in regard to its allegation that the surcharges are not just and reasonable. Once again, there is no reason to believe that this flat rate is any more discriminatory than any other flat rate that is commonly charged by a telecommunications company for other services. A customer that makes few calls and as a result pays more per minute of service in one month may well make more calls the next month and as a result pay less per minute for those services. If that customer finds that he or she is not receiving good value for the long distance service used, the competitive market will allow them to choose either a different service plan or a different service provider. The monthly intrastate recovery fees included in the challenged tariffs do not improperly discriminate against customers that use fewer minutes of long distance service.

Public Counsel also argues that the monthly surcharges discriminate against residential customers of the long distance carriers because the surcharges do not apply to business customers, even though calls by business customers incur the same intrastate access charges as calls made by residential customers.

Public Counsel's argument is not persuasive because residential and business service classes have long been recognized as separate classes of custom-

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ers, and Section 392.200.3 specifically permits telecommunications companies to charge different rates for service to different classes. Furthermore, since business customers generally pay more per minute for their long distance services, there is less need for the companies to impose a surcharge on business customers to recover access fees.

Most fundamentally, long distance services for business and residential classes are offered in different competitive markets. A reasonable rate in the business market might not be a reasonable rate in the residential market. These companies, which are competing in those markets, have the ability to choose the rates at which they will offer their services in those markets. But if they choose poorly, they will lose their customers to other competitors and they will be driven out of the market. This Commission will not attempt to dictate rates different than those that result from the discipline of the marketplace.

Finally, for the charges imposed by AT&T, MCI, and Teleconnect, but not by Sprint, Public Counsel argues that the monthly surcharges discriminate against rural Missouri long distance customers because the surcharges are not paid by long distance customers that receive local phone service from those companies or their local affiliates. According to Public Counsel, AT&T, MCI, and Teleconnect target their local phone service offerings toward Missouri's urban areas. As a result, a rural customer is more likely to be unable to receive local service from those companies and is thus more likely to be required to pay the monthly surcharge.

Public Counsel presented no evidence to support its assertion that AT&T, MCI, and Teleconnect target their local phone service offerings to urban Missouri, to the exclusion of more rural areas. There is nothing in the tariffs that explicitly favors urban consumers, or excludes rural consumers. The companies are justified in waiving the surcharges for customers that also take local phone service from that company because of the reduced access fees that the company will need to pay to complete long distance calls to their own customers. Any exclusion of rural consumers that might result from a decreased ability to obtain local service from these providers is merely incidental and is not a sound basis for rejecting these tariffs.

The evidence and arguments presented by the parties establishes that the monthly instate connection fees established by the tariffs at issue do not unduly discriminate against any Missouri customer. Furthermore, the "just and reasonable" requirement of Section 392.200.1 does not apply to the competitive rates offered by competitive companies that are challenged in these cases. Instead the legislature has determined that these rates are just and reasonable because they result from the operation of the competitive marketplace. On that basis, Public Counsel's motions to reject these tariffs must be denied.

IT IS THEREFORE ORDERED:

1. That the Office of the Public Counsel's motion to reject the tariff submitted by AT&T Communications of the Southwest, Inc., to establish a monthly instate connection fee and surcharge, pending in case number TT-2002-129, is denied.
2. That the Office of the Public Counsel's motion to reject the tariff submitted by Sprint Communications Company, L.P. to establish a monthly instate connection fee and surcharge, pending in case number TT-2002-1136, is denied.

3. That the Office of the Public Counsel's motion to reject the tariff submitted by MCI WorldCom Communications, Inc., to establish a monthly instate connection fee and surcharge, pending in case number XT-2003-0047, is denied.

4. That the Office of the Public Counsel's motion to reject the tariff submitted by MCI WorldCom Communications, Inc., to increase its monthly instate connection fee and surcharge, pending in case number LT-2004-0616, is denied.

5. That the Office of the Public Counsel's motion to reject the tariff submitted by Teleconnect Long Distance Services and Systems Company, a MCI WorldCom Company, d/ b/a TelecomUSA to increase its monthly instate connection fee and surcharge, pending in case number XT-2004-0617, is denied.

6. That this Report and Order shall become effective December 23, 2005.

Davis, Chm., Murray, and Appling, CC.,
concur;
Gaw and Clayton, CC., dissent, with
dissenting opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONERS STEVE GAW AND ROBERT M. CLAYTON III

By its Report and Order in the above-captioned docket, the majority has permitted several long distance telecommunications companies to create, or increase the amount of, instate access recovery fees and surcharges for certain long distance customers. In its Order the majority determines that, due to recent legislation, the "just and reasonable" provisions of Section 392.200.1 are no longer applicable to competitive companies. Furthermore, the majority disregarded Public Counsel's assertions that these charges fail to comply with the anti-discrimination provisions of Sections 392.200.2 and 392.200.3. Without addressing the legality of the proposed charges, we must dissent on the basis that the proposed charges constitute poor public policy and will inevitably lead to customer confusion.

On August 9, 2005, the Commission promulgated 4 CSR 240-33.045 which requires clear identification and placement of separately identified charges on customer bills.¹ This rule was proposed and ultimately promulgated because of heightened customer confusion over the increasing number and nature of charges appearing on the customer's telecommunications bill. By passing this rule, it was these commissioners' hope that telecommunications companies would be forced to eliminate the multitude of separate charges that appear on the bill thereby

¹ The rule was subsequently published in the Missouri Register and became effective on October 30, 2005.

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making it easier for consumers to compare prices for plans from different companies. Instead the Commission watered down the consumer protection provisions proposed. The rule as passed, however, does not preclude this Commission from denying the use of billing methods that serve to mislead customers. It is not good policy to allow AT&T to place a surcharge on the bills for "access fees" without any correlation between the fee charged to the customer and the customer cost causation relating to access. It is also a concern that it is not clear that the amount charged to all customers reflects the particular charges incurred by the company. Furthermore, having an additional fee outside the rate charged for the service, makes the companies rate for the service appear less than it actually is. This Commission should not be a partner in this deceptive result.

As we have stated, placing these charges outside of base rates allows a company to mislead customers into believing that the rates are less than the actual rates being billed. On the other hand, including such charges in base rates would allow customers to better compare telecommunications packages between competing companies on an apples to apples basis and would have helped to decrease the confusion experienced by these customers every time they open a telephone bill. Because this Order supports adding yet another surcharge on consumers' telephone bills, we must respectfully dissent.

In the Matter of the Application of Aquila, Inc., for Authority to Acquire, Sell and Lease Back Three Natural Gas-Fired Combustion Turbine Power Generation Units and Related Improvements to be Installed and Operated in the City of Peculiar, Missouri.*

*Case No. EO-2005-0156
Decided December 19, 2005*

Electric §4. A Chapter 100 financing arrangement involving the sale and lease back of utility plant is not the type of transaction that Section 393.190 was meant to cover. The utility does not give up control over the assets, and the assets were not providing electricity on the date of the transfer.

Evidence, Practice and Procedure §8. The Commission allowed the Office of the Public Counsel to withdraw from a stipulation after a stipulation hearing, but before the Commission decided to approve or reject it.

APPEARANCES

Paul Boudreau, Esq., Brydon, Swearingen, and England, 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102, for Aquila, Inc.

Mark Comley, Esq., Newman, Comley and Ruth, P.O. Box 537, Jefferson City, Missouri 65102, for Cass County, Missouri.

Mark Wheatley, Esq., Senior Public Counsel, 200 Madison Street, Suite 650, P.O. Box 2230, Jefferson City, Missouri, 65102, for the Office of the Public Counsel and the public.

Nathan Williams, Esq., Associate General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Ronald D. Pridgin**

REPORT AND ORDER

Procedural History

On December 6, 2004, Aquila filed its Application with the Missouri Public Service Commission under Section 393.190 RSMo and Commission Rules 4 CSR 240-2.060, 3.110. and 20.015. Aquila asked the Commission for permission to enter into Chapter 100 financing with the City of Peculiar, whereby Aquila would sell and lease back three combustion turbines to the city. Also, Aquila asked the Commission to value those turbines and the associated equipment and to determine that Aquila's acquisition of the turbines from an unregulated affiliate did

* The Commission, in an order issued on February 1, 2007, denied a motion for rehearing in this case.

not result in a financial advantage to the unregulated affiliate. Aquila later amended its application, and withdrew a request that the Commission find that Aquila's acquisition of the turbines from its unregulated affiliate was the least cost option.

On September 1, 2005, Aquila, Staff, and the Office of the Public Counsel (OPC) filed a Stipulation and Agreement. The Agreement purported to resolve all issues among the signatory parties. The Agreement is among less than all parties to this case. But Cass County and the City of Peculiar (the non-signatory parties) stated that they neither support nor oppose the Agreement, and do not request a hearing. The Commission held a hearing on the stipulation on September 21.

After the hearing, OPC filed a Motion for Stay. OPC explained that Aquila had already sold and leased back the equipment that was the subject matter of Aquila's application. OPC later asked the Commission to declare the transaction void, and to order its General Counsel to pursue civil and criminal penalties against Aquila. The Commission held a hearing on OPC's request on December 5.

Discussion

In its Order Setting Hearing issued on November 9, the Commission listed its concerns as follows:

Should the Commission approve the Stipulation and Agreement?

Aquila, Staff and OPC filed a stipulation. OPC now asks the Commission to reject the stipulation on the grounds that Aquila misled and deceived the signatories to the stipulation and the Commission.¹ The stipulation states that it shall be terminated in the event that, among other things, the Commission finds that Aquila misrepresented facts relevant to the stipulation.² That stipulation also states that if the Commission does not approve the stipulation in total, it shall be void.³

Should the Commission approve the Application?

If the Commission does not approve the stipulation, then the Commission must still determine whether to approve Aquila's initial application. The application asks the Commission to allow Aquila to enter into Chapter 100 financing with the City of Peculiar, whereby Aquila would sell and lease back three combustion turbines to the city. As discussed below, the Commission finds that Aquila has already sold and leased the assets back from the City of Peculiar, and that the Commission will not disturb this financing mechanism.

The Application also asks the Commission to determine that Aquila's acquisition of the turbines from an unregulated affiliate did not result in a financial advantage to the unregulated affiliate. The parties agreed upon a value of the assets in question. But the stipulation states that if the Commission does not approve the stipulation in total, then the stipulation is void. Therefore, the Commission and the signatories are not bound by the previously agreed-upon value.

Is Aquila's transaction or purported transaction with the City of Peculiar void as a matter of law?

¹ See Public Counsel's Response to Order Directing Filing, ¶ 19, 20 (filed October 14, 2005).

² See Stipulation and Agreement, ¶ V.C (filed September 1, 2005).

³ See *id.*, ¶ V.E.

The Office of the Public Counsel asserts that Aquila's December 30, 2004 transaction with the City of Peculiar violates Section 393.190.1, RSMo.⁴ That statute states that an electrical corporation shall not sell a part of its franchise, works or system necessary or useful in the performance of its duties to the public without first getting Commission authority to do so. Aquila states that the sale and lease-back agreement with the City of Peculiar is not the type of transaction Section 393.190 covers because Aquila maintains control of the assets.⁵ Staff believes that the transaction was void, yet does not object to the Commission approving a new, prospective Chapter 100 financing.⁶

Did Aquila inform Staff and OPC of its transaction with the City of Peculiar, and if so, when?

The Office of the Public Counsel asserts that it did not know that Aquila had already sold and leased back the assets in question until after the September 21, 2005 hearing on the Stipulation and Agreement.⁷ OPC states that Aquila had the duty to be more forthright in its pleadings and to not rely upon testimony offered in another case for its notice to the parties and the Commission.⁸ Staff states that Aquila failed to effectively communicate the transaction to Staff.⁹ Aquila argues that it had informed OPC and Staff of the transaction in January 2005 and again in March 2005.¹⁰

What effect, if any, do Aquila's pending cases in the Court of Appeals, Case Nos. WD64985 and WD65000, have on this case?¹¹

Though the order is under appeal at the Missouri Court of Appeals, the Circuit Court of Cass County has enjoined Aquila from building the South Harper facility and Peculiar Substation on which the turbines and associated equipment in question are to be placed.¹² Furthermore, though the order is not final, the Missouri Court of Appeals has ruled that the City of Peculiar's issuing revenue bonds to fund the purchase of the turbines and associated equipment was void due to the city's failure to put the issue to a vote of its citizens.¹³

⁴ See *infra* at n.1, at page 8.

⁵ See Aquila's Response to Order Directing Filing, ¶ 10 (filed October 14, 2005).

⁶ See Staff's Response to Order Directing Filing, ¶ 8-9; Tr. 144, 343-344.

⁷ See *infra*. at n.1, ¶ 4.

⁸ See *id.* at ¶ 9-12.

⁹ See *infra*. at n.6, ¶5.

¹⁰ See Reply to Responses of Public Counsel and Staff, ¶ 6-9 (filed October 24, 2005).

¹¹ As Aquila's counsel correctly pointed out at the December 5 hearing, Aquila is not a party to Case No. WD65000; the City of Peculiar is. The City of Peculiar filed an Application for Transfer with the Supreme Court of Missouri on December 7, 2005 in Case No. SC87302. The Supreme Court ordered StopAquila.org to file Suggestions in Opposition no later than December 19.

¹² See *Stopaquila.org v. Aquila*, Circuit Court of Cass County Case No. CV104-1443CC (January 11, 2005), *appeal pending*, WD64985.

¹³ See *Stopaquila.org v. City of Peculiar*, WD65000 (opinion issued October 4, 2005), *app. for reh'g and transfer denied* (November 22, 2005), *app. for transfer pending*, SC87302.

Findings of Fact

1. Aquila is a public utility engaged in providing electric service in Missouri, and is an electrical corporation subject to the jurisdiction of the Commission. Aquila is a Delaware corporation with its principal place of business in Kansas City, Missouri.¹⁴

2. Aquila, the Staff of the Commission, and the Office of the Public Counsel entered into a Stipulation and Agreement on September 1, 2005. Though parties to the case, the City of Peculiar and Cass County neither joined in, nor objected to, the Stipulation and Agreement.¹⁵ The Stipulation and Agreement is thus non-unanimous. The Office of the Public Counsel now wishes to withdraw from that Stipulation and Agreement.¹⁶

3. The parties filed testimony regarding the value of the turbines. However, no witnesses testified about their value at the September 21, 2005 hearing or the December 5, 2005 hearing. Without cross-examination of the witnesses, the Commission does not have adequate evidence to rule on the portion of the Application asking for a value of the turbines.

4. Aquila sold and leased back three combustion turbines to the City of Peculiar on December 30, 2004.¹⁷ At that time, Aquila was not using those turbines to generate electricity.¹⁸

5. Aquila began generating electricity at the South Harper Station on June 30, 2005.¹⁹

Conclusions of Law

1. Aquila is an "electrical corporation" and a "public utility" within the intents of the Missouri Public Service Commission Law.²⁰

2. The Missouri Public Service Commission has jurisdiction over the services, activities and rates of Aquila.²¹

3. The Commission is authorized to hear and determine complaints made by "any corporation or person" concerning "any act or thing done or omitted to be done by any corporation, person or public utility."²² The Commission therefore has jurisdiction to hear the Office of the Public Counsel's request to reject the September 1, 2005 Stipulation and Agreement due to Aquila's alleged malfeasance.

¹⁴ See Application, ¶ 2 (filed December 6, 2004).

¹⁵ See Cass County's Notice of Position on Stipulation and Agreement (filed September 8, 2005); City of Peculiar's Notice of Position on Stipulation and Agreement (filed September 16, 2005).

¹⁶ Tr. 104, 240, 258-59.

¹⁷ See Ex. 1 to September 21 hearing, Schedule DRW-5; Tr. 123-124; 132-133; 159; 166; 220.

¹⁸ Tr. 125, 214

¹⁹ Tr. 223.

²⁰ Section 386.020, (15) and (42), RSMo Supp. 2001. Section 386.010 states that Chapter 386 shall be known as the "Missouri Public Service Commission Law."

²¹ Sections 386.020(42) and 386.250(1), RSMo Supp. 2005.

²² Section 386.390.1, RSMo 2000.

4. An electrical corporation's sale of any part of its franchise, works or system necessary or useful in the performance of its duties to the public is void without having first obtained an order from the Commission authorizing the sale.²³ Because the turbines and associated equipment were not providing electricity to Missourians on December 30, 2004, those assets were not necessary or useful at that time. Therefore, Section 393.190 does not apply to this transaction.

5. Aquila's December 30, 2004 sale and lease-back of the facilities was not the type of transaction that Section 393.190 was meant to govern because Aquila maintained complete control over the assets.²⁴ A separate issue, which the Commission will address in Aquila's pending rate cases, is who will pay for the cost of South Harper. An asset must be used and useful before an electrical corporation can charge for operating or financing it.²⁵

6. Because Aquila did not need Commission approval before the transaction, the Office of the Public Counsel's requests for civil and criminal penalties against Aquila are not properly before it.

7. A Missouri electrical corporation must seek Commission approval to issue debt;²⁶ Aquila is not a Missouri electrical corporation. A Missouri electrical corporation needs Commission approval before issuing debt that is based upon assets that are necessary or useful to meet the public needs.

IT IS THEREFORE ORDERED:

1. That the portion of the Application that Aquila, Inc., filed on December 6, 2004, asking for approval of its Chapter 100 financing arrangement with the City of Peculiar is dismissed.

2. That the Stipulation and Agreement that Aquila, Inc., the Staff of the Commission and the Office of the Public Counsel filed on September 1, 2005, is rejected.

3. That the portion of the Application asking the Commission to assign a value to the turbines now located at the South Harper Station is denied due to a lack of competent and substantial evidence.

4. That nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.

5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.

6. That the Office of the Public Counsel's requests for relief, and all other pending motions, are denied.

7. That this Report and Order shall become effective on December 30, 2005.

²³ Section 393.190.1 RSMo 2000.

²⁴ See *In re Arkansas Power and Light*, Commission Case No. EO-81-216 (January 23, 1981)(in which the Commission held that a similar transaction was a financing transaction, and did not come within the purview of Section 393.190.

²⁵ Section 393.135 RSMo 2000.

²⁶ Section 393.200 RSMo 2000.

8. That this case may be closed on December 31, 2005.
Davis, Chm., Murray and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
certify compliance with the provisions
of Section 536.080, RSMo 2000.

**DISSENTING OPINION OF COMMISSIONERS STEVE GAW
AND ROBERT M. CLAYTON III**

These Commissioners dissent from the majority's Report and Order which advances Aquila's financing proposal by declining jurisdiction over the transaction. The holding of the majority relinquishes regulatory authority on such questions and sets the wrong precedent for future cases. Based on the following analysis, these Commissioners dissent.

I. INTRODUCTION

On December 6, 2004, Aquila, Inc. filed an Application with the Commission. As structured, the Application would result in the construction of the South Harper Generating Facility (the "Project"). This construction would actually be financed by the City of Peculiar through the issuance of \$140 million of tax-advantaged Chapter 100 revenue bonds and ownership of the Project would be held by the City of Peculiar. Following such construction, Aquila would lease-back the completed Project for a 30-year period and, following the expiration of the lease, Aquila would assume ownership of the generating facility. Under the lease, Aquila would be responsible for the operation, maintenance and control of the generating facility.

As contained in its Application, Aquila deemed it necessary to receive an affirmative order which would specify the following authorizations:

- (E) Authorizing Aquila to sell and convey to Peculiar all real estate, facilities, equipment and installation necessary to install, construct, control, manage and maintain the Project;
- (F) Authorizing Aquila to lease the Project from Peculiar and operate the Project; and
- (G) Authorizing Aquila to cause the Project to be pledged to the Trustee under the terms of the Indenture as security for the holders of the Bonds.

On September 1, 2005, Aquila entered into a Stipulation and Agreement with the Staff and the Office of the Public Counsel. Apparently still believing that it needed these specific authorizations from the Commission, the Stipulation would have provided Aquila the necessary Commission approvals to move forward with the project. After entering into the Stipulation, however, it became known that Aquila had not waited to receive such authorizations. Rather, Aquila had unilaterally proceeded with: (1) the sale of the turbines to the City of Peculiar; (2) the purchase of the Chapter 100 revenue bonds issued by the City of Peculiar; (3) the execution of a lease of the Project with the City of Peculiar; and (4) the execution of a Deed

of Trust and Security Agreement providing Commerce Bank a security interest in the Project as security for Aquila as holder of the Chapter 100 revenue bonds. In fact, Aquila had undertaken all such transactions less than one month after filing its Application with the Commission.

Despite Aquila's numerous public proclamations from the previous 9 months that such authorizations were necessary prior to undertaking these transactions, when it was faced with the fact that it had undertaken such transactions without Commission approval and in contravention of Missouri statutes, Aquila promptly changed its position and claimed: (1) that such approvals were not necessary; (2) that the Commission did not have jurisdiction over the transactions; and (3) that the Application should be dismissed.

The majority has adopted Aquila's most recent argument and declined jurisdiction over the transactions. The majority's rationale in this case, that these assets were not "necessary or useful" since they were not operational, sets a bad precedent for future cases in Missouri. It is one thing to accommodate Chapter 100 financing provisions, but it is far more troubling to employ a rationale that a company may dispose of any asset that is not currently deployed in the provision of service. The Commission recently approved a regulatory plan for KCP&L as well as two other regulated entities providing for special regulatory treatment to assist in the construction of the 800 MW Iatan 2 Generation Station. The cost of this plant will ultimately be in the hundreds of millions of dollars. Ratepayers will have provided early support to the companies prior to the plant generating any electricity. Yet with this decision, the majority would conclude that KCP&L could, at any time prior to the generation facility being operational, sell all or part of the new facility without approval of this Commission.

In fact, using the rationale of the majority, it is arguable that a utility could simply turn off a generator that had been operational up to that time, declare it no longer necessary, and sell it without prior authority from the Commission. It is easy to imagine how utilities could manipulate around the dictates of Section 393.190 at will. This Commission may have intended to let one dog out of the kennel, but it has left the gate open for the remainder to run out as well.

The importance of Section 393.190 should not be underestimated. Leaving review of this Commission to after-the-fact prudence reviews of asset sales is not sufficient. This Commission is assigned the responsibility to ensure that a utility has sufficient assets to serve its customers. This responsibility is a fundamental tenet behind the Commission's informal and formal integrated resource planning. The Commission should not surrender a large portion of that responsibility in an order which has such little analysis and consideration for the precedent being set.

II. WERE THE ASSETS "NECESSARY"?

Up to this point in time, the case law regarding the transfer of assets has been fairly clear-cut and has not required any real definition to the statutory terms of "necessary" or "useful" as contained in Section 393.190. Despite the lack of definition interpreting Section 393.190, there are other judicial decisions which provide guidance as to the definition of "necessary".

In *State ex rel. Union Electric Company v. University City*, the St. Louis Court of Appeals addressed a city's ability to deny a conditional use permit to an electric utility seeking to erect an electric substation at a specified site.¹ The court noted that one consideration for the city council is whether the electric substation is "necessary for public convenience at the location." In that decision, the court discussed whether alternative locations would suffice for the placement of the electric substation. Ultimately, the court determined that "necessary" did not require "absolute necessity". Rather, the court found that "necessary" means "suitable, proper and convenient to the ends sought."² In its pending rate case, Aquila argues that these turbines are needed in order for Aquila to meet its obligation of delivering electricity to its current Missouri customers. Clearly, given this definition of necessary, the combustion turbines owned by Aquila and ultimately transferred to the City of Peculiar were necessary according to Aquila in that they were "suitable, proper and convenient to the ends sought."

Aquila's own application in the pending proceeding argues that these combustion turbines were necessary. In its Application, Aquila discusses its need for the purchase of the three combustion turbines. Aquila notes:

Aquila, on behalf of its Aquila Networks operating divisions in Missouri, issued several requests for proposals and conducted multiple independent solicitations seeking in excess of 500 MW of power supply beginning in 2005; 500 MW replacing an existing purchase power agreement from a combined cycle facility interconnected with the Aquila Networks-Missouri transmission system and approximately 25 MW to 100 MW necessitated by system load growth. Aquila Networks' evaluation of the comprehensive list of responses/solicitations determined that a portfolio of alternatives rather than one single response provided the least-cost supply option. Specifically, Aquila Networks determined the least-cost supply option combination to be comprised by the application of three (3) combustion turbine generators with a combined nominal rating of 318 MW and two (2) power supply agreements of 75 MW (eight-year duration) and 150 MW (five-year duration), respectively.³

This admission by Aquila clearly indicates that, while the three combustion turbines may not have been an absolute necessity to Aquila's network, these combustion turbines were clearly "suitable, proper and convenient to the ends sought." Given these combustion turbines were necessary, any transfer would require the approval of the Commission or would otherwise be void.

¹ 449 S.W.2d 894 (Mo. App. 1970).

² *Id.* at 901.

³ See, *Application of Aquila, Inc.*, Case No. EO-2005-0156, filed December 6, 2004, at page 5. (emphasis added).

III. "NECESSARY" IS NOT DETERMINED BY A RATE BASE DETERMINATION

In its Report and Order, the majority appears to confuse the standard for the exercise of Commission jurisdiction over transfer of assets, Section 393.190, with the standard for the inclusion of an asset in a utility's rate base, Section 393.135. Specifically, the majority makes the following conclusions:

8. Because the facilities were not necessary or useful in the performance of Aquila's duties at the time of the transaction, Aquila did not need Commission approval before the transaction.

9. An asset must be used and useful before an electrical corporation can charge for operating or financing it.

It is unclear the basis for the majority including the reference to the "used and useful" rate base standard in an unrelated discussion regarding the transfer of a necessary asset.⁴

The General Assembly was very clear in its use of standards for the exercise of the differing Commission authority. As previously discussed, exercise of Commission jurisdiction under Section 393.190 is predicated on a finding that the asset is "necessary or useful" in the performance of the utility's duties to the public. On the other hand, Section 393.135 requires a finding by the Commission that an asset is "fully operational and used for service" prior to allowing any electric corporation to assess any charge associated with the asset.

These standards are noticeably different. By using disparate standards, it is clearly contemplated that the Commission's jurisdiction over the transfer of assets could encompass assets that were not yet included in the electric utility's rate base. That is to say, an electric utility could possess an asset that is necessary, and is therefore regulated under Section 393.190, but is not yet "fully operational and used for service" and includable in rate base under Section 393.135. The Commission's offhanded reference to the "used and useful" standard is not only an inaccurate recitation of the Commission's rate base standard, it only serves to confuse the exercise of the jurisdiction called into question by the current application.

IV. THE COMMISSION'S FINDING REGARDING "CONTROL OF ASSETS" IS NOT AN ACCURATE DETERMINATION AND IS OTHERWISE IRRELEVANT TO THE EXERCISE OF COMMISSION JURISDICTION

In its Report and Order, the majority reaches the conclusion that:

7. Aquila's December 30, 2004 sale and lease-back of the facilities was not the type of transaction that Section 393.190 was meant to govern, because Aquila maintained complete control over the assets.

⁴ While the "used and useful" standard is often used in generic ratemaking discussions, this standard is not contained in the Missouri statutory provision regarding the opportunity to earn on an asset. Instead, Proposition One required an electrical asset to be "fully operational and used for service" prior to the Commission including the asset in rate base. As such, the "used and useful" standard is not an accurate recitation of Missouri law and is not relevant to the pending discussion.

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As the previous discussion regarding the relevant statutory provision (i.e., whether the asset is necessary or useful") indicates, the fact that a utility retains "control" of an asset, is not relevant to the question of whether Commission jurisdiction is invoked. Section 393.190 provides in pertinent part that:

No . . . electrical corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, . . . without having first secured from the commission an order authorizing it so to do.

Thus, while certain of the prohibited actions are characterized by a change in the control of the asset (i.e., sell, assign, lease or transfer), other actions are prohibited under the statute regardless of whether the utility maintains control of the asset (i.e., mortgage or otherwise encumber).

As such, while the majority's focus on the control of the asset may be relevant to a decision whether the combustion turbine was sold, assigned, leased or transferred, the control of the asset will not be determinative of whether the asset is mortgaged or otherwise encumbered. In fact, the very nature of a mortgage, one of the prohibited acts, is to place a lien on the property without incurring a transfer of control. Black's Law Dictionary notes that a mortgage "is regarded as a mere lien, and not as creating a title or estate." Similarly, an encumbrance, also prohibited by the statute, is defined as a "claim, lien, charge, or liability attached to and binding real property." Given the nature of these two prohibited acts (a mortgage or encumbrance), the majority's focus on the control of the asset is misplaced.

Nevertheless, it is clear, given the documents executed by Aquila and the City of Peculiar that a sale of an asset has occurred despite the majority's insistence that Aquila "maintained complete control over the assets". Specifically, Aquila, Inc., executed on behalf of its Missouri operating division a Bill of Sale. That Bill of Sale explicitly provides that Aquila "does now **GRANT** and **CONVEY**, unto Buyer and its successors and assigns, all of its right, title, and interest, if any, in and to all machinery, equipment and other personal property whether or not installed or kept on the Project Site, and constituting the "Project Equipment", as such terms are defined in the Lease Agreement."⁵ The fact that the same parties subsequently provided for the lease-back of the same Project Equipment in no ways negates the fact that the assets were indeed sold, an action in direct contravention of Section 393.190.⁶

⁵ See, Bill of Sale, Case No. EO-2005-0156.

⁶ In a separate Economic Development Agreement, the occurrence of a sale is also made clear. "Aquila and the City expect that the Project, the Property, and the Turbines will be conveyed to and legal title held by the City (and Aquila hereby agrees to timely take such actions and execute such documents as may be required to convey title to the Project and the Property to the City consistent with this Section)". Furthermore, in its Application, Aquila notes that the Project "involves a transfer of legal title of the CTs, associated equipment and the real estate upon which the Project shall be located to Peculiar".

The sale of the asset from Aquila to the City of Peculiar is further demonstrated by the City's subsequent action of executing a Deed of Trust and Security Agreement on behalf of Commerce Bank. This document provides that "the City does hereby **GRANT, BARGAIN AND SELL, CONVEY AND CONFIRM**, unto the Mortgage Trustee, and unto his successors and assigns forever, in trust, and assigns and grants to the Trustee for the benefit of the legal owner from time to time of the Bonds a security interest in, all of the hereinafter described properties whether now owned or hereafter acquired situated in City of Peculiar, Missouri (the "Property")." The "Property" is subsequently defined to include all rights, title and interest in the electricity generation, transmission and distribution facilities contained in the South Harper Peaking Facility as well as the Peculiar 345 kV Substation. Given the City's subsequent execution of a Deed of Trust and Security Agreement, it is difficult to maintain that a sale of the assets from Aquila to the City never occurred merely because Aquila maintained some operational control under a lease.

V. APPLICABILITY OF THE ARKANSAS POWER & LIGHT PROCEEDING

In a footnote, the majority attempts to buttress its argument that this transaction does not fall within the purview of Section 393.190 because Aquila maintained control of the assets, by pointing to a prior Arkansas Power & Light (APL) decision. Ignoring the fact that prior Commission decisions are not binding on a subsequent Commission, the use of the Arkansas case in the matter is flawed. The Commission in the Arkansas case gave multiple possible reasons for not examining the transaction among them being that the company was not a Missouri entity, that the pollution control equipment in issue was located in Arkansas and that it was not clear that the assets were necessary in the performance of APL's duties to its Missouri customers. None of these reasons exist in the present case. It is understandable that the Commission in the Arkansas case would have seen little reason to intervene in a matter so removed from Missouri interest. It is not understandable with Aquila – a company headquartered in Missouri with thousands of Missouri customers in a matter involving a generating facility to be built in Missouri and used to serve Missouri customers. This Commission should not use the analysis of the Arkansas case to expand the exception to the Commission's jurisdiction over a Missouri utility with an asset intended to be used entirely for the purpose of serving Missouri customers.

In fact, since the issuance of the APL decision, this Commission has exercised its jurisdiction over Chapter 100 financings with a utility under a similar fact situation as the present case. In its Application, Aquila notes the Commission's previous decision regarding Union Electric's use of Chapter 100 financing for the purpose of constructing an electric generating facility in Bowling Green, Missouri. Given its previous acceptance of and reliance on the Union Electric decision, it is disingenuous for Aquila to now claim a lack of Commission jurisdiction based upon the 25 year old APL decision.

VI. RELATED COURT DECISIONS

The current proceeding is just the latest in a long line of proceedings, judicial and administrative, deriving from the siting, construction and financing of the South Harper Generating Facility. While none of these proceedings are final and all are

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still subject to various degrees of reconsideration or appeal, the current judicial determinations regarding South Harper establish the following facts:

- (1) The South Harper Generation Facility could not be sited by Aquila without a specific grant of authority by the Public Service Commission;
- (2) The Commission's previous grants of service area authority did not constitute the specific grant of authority necessary for the placement of a generation facility;
- (3) As such, Aquila had not received specific authority from the Commission prior to beginning construction of the South Harper electric plant, in direct contravention of Section 393.170.1; and
- (4) As a result of its failure to receive the approval of its citizens, the City of Peculiar did not have the authority to issue the Chapter 100 Revenue Bonds underlying the construction of the South Harper facility.

Against these numerous pending legal impediments to the siting, construction, financing and operation of the South Harper facility, these Commissioners question the wisdom of moving forward with the current proceeding. Setting aside the legal problems as stated herein, a great cloud of uncertainty hangs over this project, the utility and the opponents of the project awaiting finality. The siting case recently affirmed by the Court of Appeals does not permit the case to move forward, while the City of Peculiar's improper issuance of Chapter 100 revenue bonds places in question the whole financing transaction. Prudence would suggest a delay until all appeals are final.

CONCLUSION

It is clear from the foregoing discussion that the CTs used in the South Harper Generation Facility were considered necessary by Aquila in the performance of Aquila's duties to the public. The necessary nature of these assets is admitted by Aquila in its Application as well as in its pending rate proceeding. As such, Section 393.190 specifically prohibits any sale, assignment, lease, transfer, mortgage or other encumbrance without the prior approval of the Commission. The record indicates that Aquila executed, in December of 2004, a Bill of Sale providing for the transfer of all of Aquila's rights, title, and interest in the South Harper CTs. Recognizing that Aquila had not yet obtained the approval of the Commission, this transaction is necessarily void. No amount of accounting or legal gymnastics can correct this legal deficiency.

Finally, these Commissioners wish to note that nothing in this Order makes reference to the questionable handling of information relating to this case by Aquila. It is apparent that the Company has been less than forthright with the Commission. Specifically, we note: (1) Aquila never voluntarily disclosed to the Commission that the December 2004 transfer occurred; (2) Aquila's failure to provide executed copies of the relevant documents; (3) Aquila's use of the future tense in its

pleadings and testimony in describing a transaction that had already occurred; (4) Aquila's claims that the Commission should have been aware of the executed transaction based upon public statements by the Mayor of Peculiar in a different proceeding, despite Aquila's principal witness denying he was aware of the December 2004 transaction at the time of the September 21, 2005 hearing; and (5) Aquila's failure to address Commissioner inquiries at the hearing or to correct the Commission and the parties' belief that the transaction had not yet occurred. Explanations by counsel and Aquila's witness were not satisfactory and proved elusive, vague and questionable. Nowhere in the majority's Order is Aquila admonished for its representations or omissions. As such, it appears that such lack of candor is acceptable practice before this tribunal. Such representations and omissions deserve further inquiry from the Commission for possible future action.

For the foregoing reasons, these Commissioners dissent.

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In the Matter of the Name Change of MCI Communications Services, Inc., to Verizon Business Services.

*Case No. XN-2006-0275**Decided January 3, 2006*

Telecommunications §1. MCI Communications Services filed tariff sheets changing the name of MCI Communications Services to MCI Communications Services d/b/a Verizon Business Services. The Commission approved the name change and accompanying tariff sheets.

**ORDER RECOGNIZING CHANGE OF NAME AND
APPROVING ADOPTION NOTICES AND TITLE SHEETS**

On December 23, 2005, MCI Communications Services, Inc. filed proposed tariff sheets adding the fictitious name, Verizon Business Services. The company also filed a statement clearly setting out both the old and new name, evidence of the name change with the Missouri Secretary of State and adoption notices and revised tariff title sheets. The tariff sheets bear an effective date of January 23, 2006.

The Staff of the Commission filed its memorandum on January 3, 2006, recommending that the Commission approve the name change and accompanying tariff sheets. In its memorandum, Staff informed the Commission that the company is not delinquent in filing its annual report and is current in paying its annual assessment.

Commission rule 4 CSR 240-2.060(5) states that a name change can be accomplished by filing a statement, clearly setting out the old and new name, evidence of registration with the Missouri Secretary of State, and an adoption notice and revised tariff title sheets with an effective date of no fewer than 30 days.

The Commission has reviewed the company's pleadings and Staff's memorandum, and finds that the company has satisfied the requirement of 4 CSR 240-2.060(5). The Commission will therefore recognize the name change of MCI Communications Services, Inc. to MCI Communications Services, Inc. d/b/a Verizon Business Services. The Commission further finds that the revised tariff sheets, reflecting the name change, will be approved.

IT IS THEREFORE ORDERED:

1. That the Commission shall recognize MCI Communications Services, Inc.'s name change to MCI Communications Services, Inc. d/b/a Verizon Business Services.
2. That the revised tariff sheets, Tariff File No. JX-2006-0495, are approved to become effective on January 23, 2006.
3. That the following tariff pages are approved:

P.S.C. Mo. No. 1

**1st Revised Adoption Notice, Replaces Original Adoption Notice
2nd Revised Title Page, Cancels 1st Revised Title Page.**

4. That the revised tariff sheets, Tariff File No. JX-2006-0496, are approved to become effective on January 23, 2006.
5. That the following tariff pages are approved:
P.S.C. Mo. No. 3
1st Revised Adoption Notice, Replaces Original Adoption Notice
2nd Revised Title Page, Cancels 1st Revised Title Page
6. That this order shall become effective on January 23, 2006.
7. That this case may be closed on January 24, 2006.

Kennard L. Jones, Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

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**In the Matter of a Request for the Modification of the Kansas
City Metropolitan Calling Area Plan to Make the Greenwood
Exchange Part of the Mandatory MCA Tier 2.***

*Case No. TO-2005-0144
Decided January 10, 2006*

Telecommunications §30. The Greenwood exchange will become a mandatory Metropolitan Calling Area Plan exchange in the Kansas City MCA. AT&T Missouri can also revise its prices through the tariff process at any time.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND ORDER DIRECTING FILINGS**

Syllabus: This order approves the Stipulation and Agreement and directs Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to file tariffs in order to implement the terms of that agreement.

On December 15, 2005, the Office of the Public Counsel, AT&T Missouri, and the Staff of the Missouri Public Service Commission filed a Stipulation and Agreement. No objections to the agreement were filed. A copy of the Stipulation and Agreement is attached to this order as Attachment A. None of the intervenors signed the agreement, but according to Commission rule 4 CSR 240-2.115(2)(C), if no party objects, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement. No party has objected regarding any issue and, therefore, the Stipulation and Agreement will be treated as a unanimous stipulation and agreement.

The parties have agreed that the Greenwood exchange will become a mandatory Metropolitan Calling Area Plan exchange in the Kansas City MCA. Those customers will be able to call toll-free all customers in the Principal Zone and in Tiers 1, 2 and 3. In addition, they will be able to call toll-free all MCA subscribers in the Tier 4 and 5 exchanges. The parties also agree that under the current law, AT&T Missouri may revise its prices through the tariff process at any time. AT&T Missouri agrees to waive any rights it may have to remain revenue neutral in Greenwood exchange under the MCA Plan. Also as part of the agreement, all Greenwood exchange customers will be permitted to retain their current telephone numbers.

The parties further agreed that it will take time for AT&T Missouri and each of the other telecommunications carriers participating in the Kansas City MCA to revise their routing functions in order to accommodate these changes. The parties do not give an estimate as to how long this process will take. AT&T Missouri will also need to file revised tariffs.

* This order contains corrections approved by the Commission in an order issued on January 11, 2006.

On October 18, 2005, the Commission held a public hearing in Greenwood, Missouri, to receive comments about the original plan filed by the Public Counsel. On January 4, 2006, the Commission convened a hearing in its offices in Jefferson City, Missouri, in order to ask questions about the agreement.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ In reviewing the agreement, the Commission notes that²

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

The record reflects that while some customers will be faced with a rate increase, those customers will benefit under the agreement from a greatly increased calling scope. In addition, customers outside of the Greenwood exchange which are subscribers to the MCA will also benefit from an increased calling scope. And, even though there are no guarantees that AT&T Missouri will not immediately raise the rates for these customers again, the legislature has prescribed that competitive companies may set competitive prices.

Based on the agreement of the parties, the testimony received at the local public hearing, and the testimony received at the evidentiary hearing, the Commission finds that the parties have reached a just and reasonable settlement in this case. Accordingly, the Commission will direct the parties to abide by the terms of the agreement. In addition, the Commission will direct AT&T Missouri to expeditiously file proposed tariff sheets with an effective date on the earliest possible date that the provisions of the agreement can be implemented. AT&T Missouri will also be directed to file a pleading accompanying its tariff explaining the steps necessary to implement the agreement and what the earliest projected date of implementation is expected to be. In addition, AT&T Missouri shall be required to file a notice in this case within two weeks if it increases EAS rates for the Greenwood exchange before January 10, 2010.

¹Section 536.060, RSMo Supp. 2004.

²Section 536.090, RSMo Supp. 2004. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³*State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on December 15, 2005, is hereby approved as a resolution of all issues in this case (See Attachment A).
2. That the parties to this case are ordered to comply with the terms of the Stipulation and Agreement.
3. That no later than February 10, 2006, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, shall file tariff sheets designed to implement the provisions of the Stipulation and Agreement with an effective date that is the earliest possible date that the provisions of the agreement can be implemented.
4. That no later than February 10, 2006, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, shall file a pleading explaining the steps necessary to implement the agreement and what the earliest projected date of implementation is expected to be.
5. That after the tariff sheets become effective and until January 1, 2010, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, shall file a notice in this case if it increases the EAS rates for the Greenwood exchange within two weeks of the effective date of the increase.
6. That this order shall become effective on January 20, 2006.
7. That this case shall close on January 21, 2006.

Davis, Chm., Clayton and Appling, CC., concur
Murray and Gaw, CC., concur, concurrences to follow

Dippell, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

Following much work and compromise, and after listening to the concerns of the residents of Greenwood, the parties have reached an agreement whereby the citizens of Greenwood will receive an expanded calling scope with the added benefit of retaining their current telephone numbers. Like all good compromises, the agreement gives each party slightly less than 100% of its desires, but enough to satisfy each party that a good compromise has been reached.

Under the law, AT&T Missouri could not have been forced to expand its local calling scopes. AT&T Missouri, however, demonstrated its willingness to work with the community by agreeing to provide expanded calling without fully recovering the revenue it will lose by doing so.

While I voted for the Order, I am writing separately to object to the language added to the Order during the Agenda meeting requiring AT&T Missouri to file a notice in this case if it increases rates for the Greenwood exchange prior to January 1, 2010. The notice will simply provide information to the Commission and the parties about a rate increase that neither the Commission nor the parties have authority to prevent. Furthermore, the Stipulation and Agreement acknowledges that AT&T Missouri may revise its prices through the tariff process at any time.

In earlier proceedings before the Commission, the Greenwood exchange was declared competitive pursuant to section 392.245, RSMo Supp. 2005. Therefore, AT&T Missouri may raise or lower its rates for customers in this metropolitan calling area at its discretion.¹ Consequently, the only apparent reason to require notice of any increase in rates is to warn that the Commission or certain political constituencies may be upset if rates are increased. There is no legitimate reason to require AT&T Missouri to reopen this case and file a notice with the Commission.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

By its Order in the above captioned docket the Commission approved a Stipulation and Agreement by which the Greenwood exchange would become a mandatory Metropolitan Calling Area Plan exchange in the Kansas City MCA. In 2004 a Task Force was assembled to make recommendations on the issue of expanded calling scopes. Representative Bob Johnson, who represents Greenwood, was a member of the task force and along with Senator Mathewson spearheaded a subcommittee that developed the final recommendations approved by the Task Force which were submitted to the Public Service Commission. The conclusion of this case, which constitutes the most significant change in the Kansas City MCA in several years, is due in part to the recommendations of that group, and I am pleased to see this occur. Because of concerns as to the commitment of AT&T to the price agreed to in the Stipulation I file this concurrence.

In 2005, new laws were passed by the Missouri legislature that made it easier for companies to escape limitations on price increases. In Case No. TO-2006-0102, decided under the new law, AT&T was granted competitive status for the Greenwood Exchange among others. This competitive determination was made in Greenwood for both business and residential service despite the fact that the market share from all residential landline competitors is a very low percentage.

Under the terms of the Stipulation, and since Greenwood is now classified as a competitive exchange, AT&T is free to raise the prices agreed to in the Stipulation, at any time, beginning immediately after an Order is issued approving the Stipulation. At the hearing, AT&T stated it would make no assurance that the price agreed to in the Stipulation would not be changed. However, AT&T claimed that due to "political pressures", it would not be likely to raise the rates for Greenwood customers. It appears that potential political fallout is the only thing that will control residential prices in an exchange like Greenwood with so little current competition. Much like my opinions in the various competitive classification cases, I continue to harbor concerns that AT&T effectively maintains monopoly status in many of these exchanges for the small business and residential customer base. Furthermore, once these "political pressures" subside, I am concerned that the mandatory MCA customers in the Greenwood exchange will be subjected to rate increases.

The Stipulation was based in part on an agreement as to the price to be charged for an increased calling area. Yet the company can, under the new law and the Stipulation, raise its rates without restriction. Thus, it is possible that this Stipulation

¹ Section 392.245, RSMo Supp. 2005.

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could in fact not produce the desired impact for the residents of Greenwood that they expect. Although AT&T would not assure the Commission that they would not change the rate in the Stipulation after its adoption for any period of time, I recognize the demand by the Greenwood customers for the expanded calling area and therefore I concur in the Order.

**In the Matter of the Application of SBC Long Distance, LLC, for
a Name Change.**

*Case No. XN-2006-0268
Decided January 12, 2006*

Telecommunications §1. The Commission recognized the name change from SBC Long Distance, LLC, d/b/a SBC Long Distance to SBC Long Distance, LLC, d/b/a AT&T Long Distance.

**ORDER RECOGNIZING NAME CHANGE
AND APPROVING TARIFF SHEETS**

On December 20, 2005, SBC Long Distance, LLC, filed an application with the Public Service Commission seeking a change of name from SBC Long Distance, LLC d/b/a SBC Long Distance to SBC Long Distance, LLC d/b/a AT&T Long Distance. With the application for name change, SBC also filed adoption notices and revised tariff title pages with effective dates of January 20, 2006. Further, SBC included with its initial filing a registration of fictitious name filed with the Missouri Secretary of State.

The Staff of the Commission filed a recommendation and memorandum on December 28, 2005, stating that it had reviewed the applicant's filing and proposed tariff sheets and had no objection to their approval. The Staff recommended that the new name be recognized and that the proposed tariff sheets be approved to become effective on January 20, 2006.

The Commission has reviewed SBC's filing, the proposed tariff sheets, and Staff's recommendation and finds that the new name should be recognized. The Commission further finds that the proposed tariff sheets reflecting the name should be approved.

IT IS THEREFORE ORDERED:

1. That the new name of SBC Long Distance, LLC d/b/a AT&T Long Distance is recognized.
2. That the following tariff pages, Tariff File Nos. JX-2006-0473 and JX-2006-0474, are approved to become effective January 20, 2006:

**SBC Long Distance, LLC d/b/a AT&T Long Distance
P.S.C. Mo. No. 3
Original Adoption Notice Sheet**

1st Revised Sheet 1, Replacing Original Sheet 1
2nd Revised Sheet 30, Replacing 1st Revised Sheet 30
P.S.C. Mo. No. 4
Original Adoption Notice Sheet
1st Revised Sheet 1, Replacing Original Sheet 1
1st Revised Sheet 21, Replacing Original Sheet 21

3. That this order shall become effective on January 20, 2006.
4. That this case may be closed on January 21, 2006.

Davis, Chm., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents, dissent to follow

Reed, Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER STEVE GAW

By its Order in the above captioned proceeding, the majority authorizes SBC Long Distance, LLC to change its name to AT&T Long Distance. Recognizing the recent SBC's recent acquisition of AT&T and the subsequent change in the corporate name to AT&T, I understand the companies desire to operate under the AT&T name and logo. Nevertheless, I am concerned that this name change will generate needless customer confusion.

A brief review of the tariffs on file with the Commission indicates that AT&T Communications of the Southwest, now part of the new AT&T, has several long distance tariffs still in effect. AT&T indicates that it will use the former AT&T Communications of the Southwest solely for marketing to the business customer while using SBC Long Distance to market services to the residential customer. Nevertheless, the fact remains, that AT&T Communications of the Southwest has a legacy group of residential customers that continue to receive long distance service under the terms and conditions of the AT&T Communications of the Southwest tariff. As such, two neighbors, one a legacy customer of AT&T Communications of the Southwest and the other a new customer of SBC Long Distance d/b/a AT&T, could both be receiving what they believe to be AT&T long distance service under different terms, conditions and tariffs from what is actually two different companies.

This Commissioner notes that such confusion can have more impact than just marketing confusion. In a recent case before the Commission involving Socket Telecom, CenturyTel and Spectra Communications d/b/a CenturyTel, Socket argued that the use of substantially similar names by two affiliates along with certain practices of the affiliates led it to believe that the two affiliates were one in the same in regard to adoption of an interconnection agreement.¹ If a more sophisticated entity such as Socket can become confused by multiple entities using a common name, certainly a residential customer seeking information about service from one of the companies, or seeking to file a complaint regarding one of those companies, will also experience such confusion.

¹ See, Case No. CO-2005-0066.

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It is undeniable that some customer confusion will be generated by the duplicity of long distance tariffs being administered under the AT&T name. While I appreciate AT&T's efforts to eliminate customer confusion by using different entities to market to different customer segments, the fact remains that similarly situated customers may continue to be provided long distance service under different terms, conditions and tariffs by entirely different entities both operating under the AT&T name and logo. This confusion should not be encouraged by this Commission. As such, I must respectfully dissent.

In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for Approval to Change Its Infrastructure System Replacement Surcharge.*

*Case No. GO-2006-0201
Decided January 19, 2006*

Gas §18. MGE is authorized to establish an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenue of \$2,388,348. MGE was attempting to raise their rates to recover costs for infrastructure system replacements and relocations.

Rates §81. MGE is authorized to establish an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenue of \$2,388,348. MGE was attempting to raise their rates to recover costs for infrastructure system replacements and relocations.

Rates §108. Application and petition by Missouri Gas Energy for the establishment of an Infrastructure System Replacement Surcharge. MGE seeks to increase its rates in order to recover costs for infrastructure system replacements and relocations that are eligible for ISRS recognition.

**ORDER APPROVING
AN INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE BUT
REJECTING SUBMITTED TARIFF**

On November 1, 2005, Missouri Gas Energy, a division of Southern Union Company, filed an Application and Petition for Establishment of an Infrastructure System Replacement Surcharge. MGE's request to change its Infrastructure System Replacement Surcharge – an ISRS – was accompanied by an implementing tariff. The Commission has suspended that tariff until March 7, 2006. MGE seeks to increase its ISRS rates in order to recover costs for infrastructure system replacements and relocations that are eligible for ISRS recognition under sections 393.1009, 393.1012, and 393.1015, RSMo Cum. Supp. 2005.

* Another order was issued in this case on January 26, 2006, granting MGE's Motion for Expedited Treatment.

MGE's current ISRS rates became effective May 13, 2005, and cover investments made for the period of May 1, 2004 through December 31, 2004. MGE's current ISRS rates generate \$1,164,726 in revenues annually. The pending application represents investments made from January 1, 2005, through October 31, 2005, and would generate an additional \$1,223,622 in annual revenues. The specific infrastructure system replacements for which MGE seeks ISRS recognition are set forth in Appendices A, B, C, and D to MGE's application.

Section 393.1015.1(2) requires that the Commission publish notice of MGE's ISRS filing. Therefore, on November 10, 2005, the Commission directed that notice of the filing be mailed to the county commission of the counties served by MGE. It also directed that notice be given to the media serving those counties, and to the members of the General Assembly representing those counties. In that same order, the Commission directed that any person wishing to intervene in this matter shall file an application to intervene no later than December 9, 2005. The Commission did not receive any applications to intervene.

Staff filed its report on January 4, 2006, indicating that its auditing and energy departments have examined MGE's ISRS application. Based on the results of its examination, Staff recommended that MGE's ISRS rates should be designed to recover annual revenues totaling \$2,388,348 (\$1,223,622 in new revenues, and \$1,164,726 from its current rates as determined in Case No. GO-2005-0273). Staff arrived at that figure using a slightly different computation of ISRS rates for each customer class than MGE proposed in its application. Based on the statutory requirement that "the monthly ISRS for each customer class maintains a proportional relationship equivalent to the proportional relationship of the monthly customer charge for each customer class,"¹ Staff calculated the ISRS rate for each customer class as follows:

Residential	\$.36
Small General Service	\$.48
Large General Service	\$ 2.86
Large Volume Service	\$14.74

On January 5, 2006, MGE filed a response accepting the recommendations contained in Staff's report. Although a party to the case, the Office of the Public Counsel did not file a response.

Based on MGE's application and Staff's report regarding that application, the Commission concludes that MGE shall be permitted to establish an ISRS sufficient to recover appropriate annual pre-tax revenues of \$1,223,622 from its current application, combined with \$1,164,726 previously approved in Case No. GO-2005-0273. MGE shall be authorized to file an ISRS rate for each customer class consistent with the rates set out in Staff's report. Because the rates differ slightly from those contained in the tariff previously submitted by MGE, that tariff shall be rejected. MGE shall, however, be authorized to file a new tariff consistent with this order. The date reserved for a potential hearing or presentation will not be necessary and shall be canceled.

¹ Section 393.1015.5(1), RSMo Cum Supp. 2005.

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IT IS THEREFORE ORDERED:

1. That Missouri Gas Energy, a division of Southern Union Company, is authorized to establish an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenue of \$2,388,348, including \$1,164,726 previously authorized in Case No. GO-2005-0273 and \$1,223,622 of additional revenues.

2. That Missouri Gas Energy, a division of Southern Union Company, is authorized to establish an Infrastructure System Replacement Surcharge rate for each of its customer classes as indicated in the Staff Memorandum filed January 4, 2006.

3. That the tariff sheet filed by Missouri Gas Energy, a division of Southern Union Company, on November 7, 2005, and assigned tariff number YG-2006-0348, is rejected. The tariff sheet rejected is:

P.S.C MO. No. 1

Fourth Revised Sheet No. 10, Canceling Third Revised Sheet No. 10

4. That Missouri Gas Energy, a division of Southern Union Company, is authorized to file a new tariff recovering the revenue, and implementing the rates, authorized in this order.

5. That the reservation of February 1, 2006, as a potential date for a hearing or presentation is canceled.

6. That this order shall become effective on January 29, 2006.

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Dippell, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of Atmos Energy Corporation to
Modify its Approved Cast Iron Main and Unprotected Steel
Main Replacement Program.**

*Case No. GO-2006-0253
Decided January 26, 2006*

Gas §13. The Atmos Energy Corporation's application to modify its approved cast iron main and unprotected steel main replacement program is approved by the Commission. Atmos attempts to replace the current low pressure system with a high pressure system.

Gas §15. The Atmos Energy Corporation's application to modify its approved cast iron main and unprotected steel main replacement program is approved. This would require the company to replace all cast iron mains by 2020 and to replace or cathodically protect all unprotected steel mains by 2005.

Gas §16. The Atmos Energy Corporation shall conduct semiannual leak surveys of the Hannibal northeast side low pressure area until the entire additional steel main has been replaced. This is well within the federal requirement that service lines be surveyed for leaks at three-year intervals. Atmos is also required to conduct semiannual leak surveys of all remaining portions of unprotected steel service lines and shall repair any class III or IV leaks within six months.

ORDER APPROVING APPLICATION

Syllabus: This order approves Atmos Energy Corporation's application to modify its previously approved Cast Iron Main and Unprotected Steel Main Replacement Program.

Background

In December of 1991, the Commission, at the request of its Staff, issued an order¹ approving United Cities Gas Company's (now Atmos Energy Corporation) pipeline replacement program in Hannibal. The program, which is consistent with 4 CSR 240-40.030(15), requires the company to replace all cast iron mains (190,550 feet) by 2020 and to replace or cathodically protect all unprotected steel mains (111,160 feet) by 2005. Upon a complete review of its records, the company realized that an additional 6,053 feet of unprotected steel main remains to be replaced or protected. The company therefore seeks to extend the 2005 deadline to 2010. Staff recommends that the Commission approve the modification.

Atmos' Application

In its application, Atmos points out that in the 1991 order the Commission determined that the plan was subject to modifications proposed by the company or Staff. Atmos states that an error in classifying the 6,053 feet of steel main as cathodically protected necessitated the proposed modification. Atmos further explains that the "additional steel main consists of 3 and 4 inch unprotected main

¹ Case No. GO-91-276.

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carrying low pressure service to customers in an isolated low-pressure area on the northeast side of Hannibal and is scattered throughout this area amongst sections of cast iron main.” Atmos seeks to replace this low pressure system with a with high pressure system. Because this area contains both cast iron and steel main, Atmos states costs of replacement would be duplicated by replacing the steel mains now and the cast iron mains later. By extending the time frame for replacement, however, Atmos states that duplicative costs can be avoided.

In addition to its requests to extend the program deadline for the replacement of steel main, Atmos requests that the plan be modified to require the company to: (1) conduct semiannual leak surveys of Hannibal’s northeast side low pressure area until all of the additional steel main has been replaced; (2) conduct semiannual leak surveys of all remaining portions of unprotected steel service lines replacing within six months all class III or IV leaks.²

Staff’s Memorandum

In recommending approval of the modification, Staff notes that the replacement program, in Case No. GO-91-276 has been successful in eliminating all unprotected steel mains that were within the initial 15-year program. Staff agrees that the company can safely replace the additional steel mains over the next five years. Staff also points out that requiring the company to conduct semi-annual leak surveys, rather than annually as required by Commission rules, is well within the federal requirement that service lines be surveyed for leaks at three-year intervals. Finally, Staff recommends that a copy of this order be placed in the Case No. GO-91-276.

Discussion

The Commission gave notice of this application and set December 22, 2005, as the deadline for intervention. There were no requests to intervene and no requests for a hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing, the Commission may grant the relief requested based on the application.

The Commission has considered Atmos’ application, along with Staff’s recommendations and concludes that the application should be approved. The Commission will also direct its Data Center to place of copy of this order in Case No. GO-91-276.

IT IS THEREFORE ORDERED:

1. That Atmos Energy Corporation’s application to modify its approved cast iron main and unprotected steel main replacement program is approved.
2. That Atmos Energy Corporation shall conduct semiannual leak surveys of the Hannibal northeast side low pressure area until the entire additional steel main has been replaced.

² Class III and IV leaks are defined in 4 CSR 240-40.030(14) as non-hazardous.

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W. 2d 494, 496 (Mo. App. 1989).

3. That Atmos Energy Corporation will conduct semiannual leak surveys of all remaining portions of unprotected steel service lines and shall repair any class III or IV leaks within six months.
4. That the Commission's Date Center shall place a copy of this order in Case No. GO-91-276.
5. That this order shall become effective on February 5, 2006.
6. That this case shall be closed on February 6, 2006.

Davis, Chm., Murray, and Appling,
CC., concur.
Clayton, C., concurs, with separate
concurring opinion to follow.
Gaw, C., dissents.

Jones, Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER CLAYTON

Although this Commissioner concurs with the majority's Order Approving Application granting Atmos a modification of its previously approved Cast Iron Main and Unprotected Steel Main Replacement Program, this Commissioner has significant concerns regarding the request for relief and the failure of Atmos to comply with a previous Order of the Commission. The underlying case involving the service line replacement program concluded with mandated replacement dates for high and low pressure cast iron main, for unprotected steel lines as well as the phasing out of the use of copper lines for providing natural gas service in the city of Hannibal.

Fourteen years and eleven months after the Commission approved a plan of line replacement, Atmos appears before the Commission requesting an Order in 19 days for permission to amend its plan. On the surface, one could argue that the case filing has a suspect appearance of attempting to pull a "fast one" over on the Commission. That appearance requires close scrutiny of the company in making the filing as well as Staff who agreed to the plan with uncharacteristic efficiency and speed.

The history of this case is set out in part in the majority's Order which includes detail on the schedule of line replacement throughout the community of Hannibal. Due to lack of infrastructure investment and significant safety concerns, the line replacement program was ordered in an effort to reduce the threat to life and property. The consequences of failing to address deteriorating infrastructure for natural gas utilities can be potentially fatal. The prior order was based on the existence of 413 leaks annually detected on the system with many of them being Class I or Class II leaks, the most dangerous.

On December 17, 1991, the Commission issued an Order in Case No. GO-91-276 approving United Cities Gas Company's (Atmos Energy Corporation) pipeline

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replacement program in Hannibal. The program requires the replacement of all cast iron main (190,550 feet) by 2020 and the replacement or cathodic protection of all unprotected steel main (111,160 feet) by 2005. In its replacement plan of 1991, Atmos gave higher replacement priority to high-pressure, unprotected steel main than cast iron main due to a higher incidence of leakage occurring in the steel main. Staff supported this prioritization. Today, all of the high-pressure, unprotected gas main has been replaced. Atmos purchased the natural gas distribution system in 1997 from United Cities Gas.

After a "complete records review by Atmos" in 2005, it discovered that 6,053 feet of unprotected steel main was still in service requiring replacement or to be cathodically protected. Atmos believes it erroneously classified this additional 6,053 feet of unprotected steel main as cathodically protected steel main. This discovery allegedly occurred in late summer or early autumn 2005 with the parties indicating that Atmos contacted Staff upon the discovery of the mis-classified footage. Atmos and Staff suggest that they began working on a plan to remedy Atmos' mistake as quickly and safely as possible.

The 6,053 feet of misclassified and recently discovered unprotected steel main are characterized to be low pressure main and appear to be interspersed among cast iron main throughout this low-pressure area. Presently, Staff records show that there are no leaks among the area from either the low pressure cast iron or from the low pressure unprotected steel lines.

On December 12, 2005, just 19 days before the ordered deadline to replace all unprotected steel mains, Atmos filed an Application to Modify Its Approved Cast Iron Main and Unprotected Steel Main Replacement Program And Motion for Expedited Treatment before the Commission. Atmos requested the Commission allow an extension of the December 31, 2005, deadline for unprotected steel main to December 31, 2010. The Commission entered an Order Modifying Cast Iron Main and Unprotected Steel Main Replacement Program on December 29, 2005. However, instead of granting Atmos its application, the Commission extended the program's deadline from December 31, 2005 to March 1, 2006, to provide the Commission time to review the circumstances surrounding the main replacement program.

First of all, this Commissioner has serious concerns with the limited amount of time afforded the Commission to review this plan. Although the parties have indicated that Staff has been working with the company since approximately September, the Staff does not make the ultimate decision to alter the plan. The Commission has the responsibility of modifying the plan and such information needs to be conveyed to the Commissioners in a timely manner, whether prior to the filing of a case or after. The company and Staff should be mindful of notifying the Commission in a manner that would allow for more deliberative study and analysis.

Secondly, the most important issue involving this application is the safety of the citizens of Hannibal and specifically those that reside in the area where main replacement will be delayed. It only takes a single catastrophic event to question the entire program and the Commission's rationale for agreeing to the program.

The present request is to delay the replacement of 6,053 feet of low pressure unprotected steel lines, which should have been replaced no later than December 31, 2005. Instead, Atmos requests that it be given until 2010 to replace the lines. On the surface, such a request should cause significant concern for the Commission. However, additional scrutiny establishes that this is a safe and appropriate plan of action, and that granting the modification of the plan is the prudent course of action in this situation.

The modification of the replacement plan allows Atmos to focus on a more immediate classification of pipe, high-pressure, 2 1/4 inch diameter cast iron main. During the additional 5 years, Atmos will commit its Hannibal resources to the 2 1/4 inch cast iron main AND to the complete replacement of the remaining Hannibal low pressure area. The remaining cast iron main in this area may be replaced sooner under this plan than would have occurred under the 2020 deadline.

In the meantime, the Order directs Atmos to leak survey all remaining unprotected steel main and service line segments semi-annually until they are replaced instead of annually as required by 4 CSR 240.40.030(14). Additionally, if Class 3 or 4 leaks are detected in the remaining portions of the unprotected service lines, Atmos is required to replace these non-hazardous leaks within six months of detection which is sooner than the current requirement of replacement within 5 years. 4 CSR 240.40(14)(C)(3). Atmos will continue to file an Annual Report with the Commission which includes the results of the semi-annual leak surveys.

In addition, denial of this application will result in a de facto re-prioritization of the replacement of service lines. The "lower priority", low-pressure unprotected steel lines will succeed the high pressure, cast iron main which are now due to be replaced. Those mains have revealed the greatest number of leaks and pose the greatest threat to the citizens of Hannibal. Approximately, 22,000 feet of such service lines require replacement which will take 3 years to address. Safety should be the top priority and this proposal continues that effort.

Atmos and Staff both point out that denial of the modification would result in the same area of streets and land being dug up on two separate occasions. Requiring Atmos to immediately replace the low-pressure, unprotected steel now and then subsequently return (prior to 2020) to the same area to replace all cast iron main and upgrade to high-pressure would be inefficient and may irritate and inconvenience the Hannibal residents. While this Commissioner does not want the citizens in Hannibal to be unduly inconvenienced, the first concern is for their safety and well-being.

This Commissioner supported the majority's Order for the foregoing reasons. In the future, this Commissioner encourages all gas providers and Staff to communicate with the Commission immediately upon the discovery of a problem of this magnitude instead of waiting until 19 days before a 15 year deadline to file an action before the Commission.

This Commissioner respectfully submits this concurrence.

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**In the Matter of an Investigation into City Utilities of Springfield
Plastic Pipe Failures and the Adequacy of Its Leak Survey
Procedures, Installation Procedures and Replacement Cri-
teria.***

Case No. GS-2004-0257

Decided February 2, 2006

Gas §§13, 16, 29, 44, 71. The Commission approved Staff's recommendation which required City Utilities to implement Staff's recommendation into its gas safety program and continue replacing plastic piping in its service lines.

ORDER ADOPTING STAFF'S RECOMMENDATIONS

Syllabus: This order adopts the recommendations of the Staff of the Missouri Public Service Commission as clarified by City Utilities of Springfield. The order also directs a status report to be filed.

Background:

An incident occurred in Springfield, Missouri, at the Ozark Empire Fairgrounds on June 18, 2003, in which natural gas leaking from plastic pipe resulted in an explosion at the Frisco Building. An employee of the Ozark Empire Fair was fatally injured. The leak in the plastic pipe was the result of rock impingement that caused the pipe to fail, resulting in natural gas escaping into the lower level of the Frisco Building. Natural gas service is provided by City Utilities of Springfield. There was an additional natural gas ignition involving the same type of plastic pipe and method of failure at 3050 North Kentwood, Springfield, Missouri, on July 10, 2003. The incident at the Fairgrounds and the natural gas ignition at 3050 North Kentwood both involved brittle-like cracking of Aldyl® "A" plastic pipe. Both failures were the result of high-localized stress concentration on the pipe wall due to rock impingement. In addition, records provided by City Utilities indicated other instances of brittle-like cracking failures on plastic pipe due to rock impingement.

On December 16, 2003, the Staff of the Commission filed a motion to open a case. Staff stated that City Utilities of Springfield is a municipal gas corporation subject to the jurisdiction of the Commission, and that the Commission has the authority to require every gas utility, including municipal gas systems, to operate its system in a manner that promotes and safeguards the public safety. Staff noted that it had filed its final investigation reports involving the two plastic pipe failures. Staff recommended a more in-depth examination and evaluation of City Utilities' plastic natural gas mains and service line piping failures, leak survey techniques over certain identified plastic natural gas mains and service lines, and examination and evaluation of the current program replacements. Specifically, Staff asked that the Commission direct that the case be opened to:

- (1) identify the plastic mains and service pipes that may be susceptible to brittle-like cracking because of rock impingements;

* See page 580 for another order in this case.

- (2) determine the criteria that should be used to identify plastic mains and service lines as potential risks for brittle-like failure due to rock impingement such as installation, operating and environmental conditions and piping failure characteristics;
- (3) evaluate the effectiveness and the need to increase or expand the leak surveys over the identified plastic mains and service lines (example: the need for bar hole surveys over piping under continuous pavement);
- (4) recommend replacement of plastic mains and service lines found in need of remedial action;
- (5) recommend and monitor completion of the replacement of all plastic service lines identified as having the potential for failure due to rock impingement or other factors.

On December 30, 2003, the Commission issued an order establishing this case to investigate the issues concerning plastic mains and service lines used by City Utilities of Springfield.

Staff's Initial Report and City Utilities' Response:

On June 16, 2004, the Commission's Staff filed its Response to the Commission's Order Establishing Case and Filing Report. Staff indicated that it has conducted an investigation and that based on the evidence gathered, believes that a long-term systematic replacement program is warranted. Staff proposed a long-term replacement program for certain identified plastic piping that is susceptible to brittle-like cracking because of rock impingement and piping that has already been identified as being in an environment conducive to brittle-like failure due to previous rock-impingement-caused leaks.

On August 17, 2004, City Utilities filed its response. City Utilities requested that the Commission adopt the recommendations of the Commission's Staff, subject to certain clarifications. The clarifications are noted in italicized text on Attachment A to this order.

Staff's 2004 Status Report:

On October 12, 2004, Staff filed a status report regarding the ongoing nature of the monitoring, evaluation, and replacement of plastic pipe in City Utilities' system. Staff indicated that its recommendations (contained in Staff's June 16, 2004 report) have been implemented into City Utilities' gas safety program and are the foundation of its continuing plastic pipe replacement program. Staff noted that it will continue to work with City Utilities to gather more data to clearly identify the plastic mains and service lines that require immediate attention and those that must be part of a longer-term replacement program. Staff noted that it would file an updated report in June 2005.

Staff's 2005 Status Report:

On June 16, 2005, Staff filed another status report. Staff reported that City Utilities continues to comply with the Staff's June 2004 recommendations and set

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out the details of that compliance. Staff recommended that the Commission continue with the recommendations in its June 16, 2004 report. Staff also requested that the Commission leave the case open to receive additional information from City Utilities and additional reports from Staff.

Commission Determination:

The Commission has not formally ordered that Staff's June 2004 recommendations, as clarified by the company in August 2004, be implemented. Therefore, the Commission shall do so now. The Commission shall also direct City Utilities to continue implementing Staff's recommendations, as discussed in Staff's June 16, 2005 report. Furthermore, the Commission shall direct its Staff to file an additional status report as set out below.

IT IS THEREFORE ORDERED:

1. That the recommendations in Staff of the Public Service Commission's June 16, 2004 report, as clarified by the August 17, 2004 response of City Utilities of Springfield, are hereby adopted.
2. That City Utilities of Springfield shall comply with the recommendations set out in the Staff of the Public Service Commission's June 16, 2004 report, as clarified by the August 17, 2004 response of City Utilities of Springfield.
3. That Staff shall file its next status report no later than June 30, 2006.
4. That this order shall become effective on February 12, 2006.

Davis, Chm., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents, opinion to follow

Dippell, Deputy Chief Regulatory Law Judge

**OPINION OF COMMISSIONER STEVE GAW
CONCURRING IN PART AND DISSENTING IN PART**

This Commissioner concurs in part and dissents in part from this Order. Although it appears that the recommendations of Staff have been followed by City Utilities of Springfield, this Commissioner believes it is important to replace pre-1982 plastic pipe in areas where rock backfill surrounds the line as soon as possible. While there is a proposed deadline in 2007 for work to be completed on lines that are known to be surrounded by rock backfill it is not known how much additional pre-1982 line might be lying in rock backfill. Furthermore, there is no deadline for replacement of other pre-1982 line.

It is important to have an aggressive leak testing program in light of a previous fatality involving brittle plastic pipe and rock backfill and a higher incidence of leaks in the pre-1982 pipe than the post-1982 pipe. Even though it is evident that the pre-1982 pipe used in Springfield is not safe, no firm deadline to replace all of the pre-1982 plastic pipe has been established. A firm replacement plan with an adequate deadline should be Staff's priority. Anything less, should not be acceptable.

It is clear that rock backfill next to this pipe can have disastrous results. Yet, even though it is not clear whether all of the areas of rock backfill have been discovered, staff's recommendation grants City Utilities an additional three years from discovery to replace the pipe.

Finally, it seems evident that the earlier conclusion in the Commission's Order in Case No. GS-2004-0040 regarding the incident at Empire Fairgrounds was incomplete in at least one point. The Commission in its Order could not determine that City Utilities was responsible for placing rock fill next to the line that leaked leading to the explosion causing the death of a Springfield man in 2003. Since that time, growing evidence suggests that the use of such rock fill along City Utilities plastic lines, a violation of gas safety rules, was not an isolated incident. Yet, despite the fact that multiple sites using such backfill have been identified, no complaint for violations of gas safety rules has been filed with the Commission.

Consistent with past concerns, this Commissioner continues to question whether the gas safety rules in Missouri are anything more than mere guidelines. Gas safety rules must be enforced if they are to have real meaning and effect in protecting the safety of our citizens.

**In the Matter of the Adequacy of Laclede Gas Company's
Service Line Replacement Program and Leak Survey Pro-
cedures.***

*Case No. GO-99-155
Decided February 7, 2006*

Gas §10. The Commission granted the requests Staff made regarding Laclede Gas Company's direct-buried copper service line replacement program and the effectiveness of Laclede's leak survey procedures. The current requirements of the previously approved Stipulation and Agreement will be continued.

**ORDER CONTINUING REQUIREMENTS OF
UNANIMOUS STIPULATION AND AGREEMENT**

Syllabus:

This order approves the Staff of the Commission's recommendation that the Commission continue the current requirements of the previously approved Stipulation and Agreement, with annual reporting from Staff to the Commission.

Background:

The Commission opened this case on October 30, 1998, as a general investigatory case to receive information relevant to the adequacy of Laclede Gas Company's direct-buried copper service line replacement program and the effec-

*See page 134, Volume 9, MPSC 3d; page 400, Volume 12, MPSC 3d; and page 84, Volume 13, MPSC 3d for other orders in this case.

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tiveness of Laclede's leak survey procedures.¹ On February 18, 2000, Laclede, Staff and the Office of the Public Counsel filed a Unanimous Stipulation and Agreement. As part of the Agreement, Laclede agreed to submit annual reports to Staff detailing direct-buried copper service line renewals and relays² completed, and agreed to submit additional reports confirming the achievement of other milestones under the Agreement. The Agreement provided that after the third year of the program, Laclede and Staff would review the progress and results of the program to determine future relay/renewal plans, including the rate of such future actions, and potential modifications to survey techniques and other related matters. On May 18, 2000, the Commission issued an order approving the Unanimous Stipulation and Agreement.

On August 1, 2003, Staff filed its Three-Year Summary Report. Staff requested that the Commission continue the current requirements of the Unanimous Stipulation and Agreement, with annual reporting from Staff. Staff stated that the requirements of the Copper Service Line Replacement Program reflect the overall goals of protecting the public, achieving a substantial number of replacements annually, using effective leak detection methods, and making timely repairs, while also being mindful of ratepayers' costs. Staff suggested that Laclede has met or exceeded the guidelines of the Stipulation and that the crucial goal of public safety is being maintained.

The Commission conducted a limited hearing on December 5, 2003.³ On March 5, 2004, the Commission issued its Report and Order, adopting Staff's recommendation that the Commission continue the current requirements of the previously approved Stipulation and Agreement with annual reporting from Staff.

Staff's August 29, 2005 Annual Report:

Staff filed its Annual Report on August 29, 2005. Staff states that it has completed an analysis of Laclede's copper service line replacements and bar-hole survey data. Based on its review, Staff recommends that the Commission continue the current requirements of the Stipulation and Agreement, with continued annual reporting from Staff. Staff's report contains the following specific recommendations.

1. Copper Service Line Replacements

During program year five (12 months ending March 1, 2005), Laclede completed a total of 8,420 direct buried copper service line replacements (main-to-

¹ Staff's investigation into the Pralle Lane (Case No. GS-98-422) and Bergerac Drive (Case No. GS-98-423) natural gas incidents led to Staff filing, on October 14, 1998, a motion to open this case.

² As used in this order, the term "renewal" refers to a main to meter replacement of a service line and the term "relay" refers to the replacement of a specific segment of a service line.

³ The Commission indicated that the purpose of the hearing was to determine whether Staff's recommendations should be approved without the necessity for further hearings. The Commission also noted that if it does not approve Staff's recommendations, it would establish a procedural schedule.

meter). During the first five years of the program, Laclede has completed a total of 42,036 direct-buried copper service line replacements, which represents approximately 54 percent of the program's beginning total qualifying services. Through the end of program year five, Laclede has averaged 8,407 direct-buried copper service line replacements each year, which exceeds the Agreement's criteria of an annual replacement rate of 8,000 direct-buried copper service lines.

Staff believes that an aggressive annual replacement rate (i.e. ten percent annually), based upon priority, with increased frequencies of leak surveys, continues to be successful and, therefore, recommends that the annual requirement of 8,000 direct-buried copper service line replacements should be maintained at this time. The current results of the replacement program are a substantial reduction in the number of direct-buried copper service lines in the system and a reduced leakage rate in the lines that remain to be replaced.

2. Bar-hole Leak Surveys

Laclede conducted its 2005 bar-hole leak survey during the months of March-July, 2005. Laclede personnel conducted a bar-hole leak survey over 8,414 direct-buried copper service lines in Pressure Region 1 and conducted a bar-hole leak survey over 29,143 direct-buried copper service lines in Pressure Region II for a total of 37,557 direct-buried copper service line bar-hole leak surveys in 2005. A total of 284 leaks were found during the 2005 bar-hole leak survey, which represents a 0.76 percent leak rate. As reported in Staff's September 2004 Annual Report, results from bar-hole leak surveys have shown a downward trend in the actual total number of new leaks discovered on copper service lines. Observations in the fifth year of Laclede's program indicate that this downward trend is continuing with the new leak rate of .076 percent, which is approximate 17.4 percent decrease from the leakage rates found during the 2004 leak survey.

While the bar-hole method for leak surveying demands more personnel time and effort, it is Staff's opinion that this method is far superior to other methods for detection of small leaks that previously might have gone undetected. Use of this superior method of leak detection, coupled with conducting the surveys on an annual basis, helps in achieving the program goals of early detection before the leak becomes hazardous and assists in prioritizing replacements. This guideline of the Agreement exceeds the Commission's minimum pipeline safety regulations that require three-year leak surveys on most residential service lines.

For these reasons, Staff recommends that Laclede continue to conduct an annual bar-hole leak survey of direct-buried copper service lines.

3. Leak Repairs

Expediting the removal of all leaks found during a bar-hole leak survey prior to conducting the subsequent year's bar-hole leak survey continues to enhance the downward trend in detected leaks during subsequent annual bar-hole leak surveys. In accordance with the Agreement, leaks detected during an annual bar-hole leak survey are required to be repaired within six months of discovery in Pressure Region I and within one year of discovery in Pressure Region II. Laclede continues to exceed the requirements in the Agreement by repairing Class 3 leaks

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in Pressure Region I within an average time of just under three months (down slightly from year 2004 of the program, further down from 3 to 4 months during the first 3 years of the program) from discovery and within an average time of just under seven months (down slightly from year 2004 of the program, further down from 7 to 9 months during the first 3 years of the program) from discovery in Pressure Region II. The guideline in the Agreement exceeds the Commission's minimum pipeline safety regulations that require Class 3 leaks to be monitored every 6 months until repaired (within 5 years of discovery).

All detected leaks, along with other historical information, are used in a prioritizing model for identifying replacement areas in a consistent manner and prioritizing the scheduling of these areas for replacement. Staff noted that it is critical that any upward trends in new leaks on replacement program pipelines be identified promptly, as upward trends can point to the need to refocus efforts to stiffen requirements to meet the program's goals and objectives.

Staff believes that timely repairs of observed leaks prior to the subsequent bar-hole leak survey provides better information to detect any upward trends in leakage rate totals. Therefore, Staff recommends that the requirements in the Agreement (calling for Class 3 leaks in Pressure Region I to be repaired within six months and Class 3 leaks in Pressure Region II to be repaired within one year) be continued.

Discussion:

The Commission has reviewed Staff's August 2005 Report and finds that Staff's recommendations are reasonable and in the public interest, and should be adopted. The Commission will therefore direct that Laclede shall continue to meet the current requirements of the Stipulation and Agreement, with continued annual reporting from Staff.

IT IS ORDERED THAT:

1. Staff's recommendation is approved. Until ordered otherwise, Laclede Gas Company shall continue to meet or exceed the current requirements of the Unanimous Stipulation and Agreement.
2. The Commission's Staff shall continue its annual reporting to the Commission until otherwise ordered. Staff's next annual report shall be filed no later than September 1, 2006, unless otherwise ordered.
3. This order shall become effective on February 17, 2006.

Murray and Appling, CC., concur
Davis, Chm., concurs, concurring opinion to follow
Gaw, C., dissents, dissenting opinion attached
Clayton, C., dissents, dissenting opinion to follow

Dale, Chief Regulatory Law Judge

CONCURRING OPINION OF CHAIRMAN JEFF DAVIS

I respectfully concur with the decision of the majority in this case and wish to address the concerns voiced by the dissent in this case.

Specifically, the dissent in this case would argue that Laclede should be replacing these lines more quickly than provided in the unanimous stipulation and agreement; however, had this decision been rejected, the unintended consequences would be further delay in the replacement of the copper lines. The Laclede Gas copper line replacement program is nearing the end of its sixth year and there are only four years left to go. Laclede Gas is ahead of schedule and, until someone presents a better plan or can show why the Commission should alter its path, we should follow the established course. In this case, the dissent offers no plan to accelerate the replacement program, no analysis as to whether such an accelerated replacement program is technically feasible and, most importantly, no plan to pay for it. In Case GR-2005-0284, the dissent voted against a 1% rate increase for Laclede Gas that was agreed to by all the parties, despite the fact that there was uncontested evidence that Laclede had invested an additional \$90 million in plant and incurred \$16 million dollars in operating expenses since 2002.¹ I share the dissent's concern about affordability, but have grave reservations about ignoring uncontested evidence in order to produce results that would make this Commission popular with the ratepayers of this state. Had the minority prevailed in that case, serious questions would be raised about Laclede's ability to recover prudently incurred capital costs, making it more difficult for Laclede to attract investment to accelerate construction projects like the one in question.

This Commission has a responsibility to make state government work for all parties, and we cannot let the fear of what might happen paralyze us to the point of inaction. We have a duty to govern. Governing requires leadership, and leadership requires a willingness to take a stand in order to advance the public interest, even though our decisions may not be popular or what an individual Commissioner would choose if he or she were acting alone.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I respectfully dissent from the Order Continuing Requirements of Unanimous Stipulation and Agreement issued by the majority in this proceeding. As previously stated, I continue to be concerned that Laclede has not been aggressive enough in its service line replacement program.

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner respectfully dissents from the majority Report and Order continuing the copper line replacement program agreed to by Staff and the company. This Commissioner believes that additional scrutiny is necessary for a 6 year old program which has a direct impact on the safety of Laclede customers

¹ Affidavit of Stephen M. Rackers, filed Sept. 9, 2005, p.3, GR-2005-0284 (2005) .

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and employees. Unfortunately, the majority focuses on the lack of dissent to the replacement program rather than seeking new answers to vital questions about the safety and security of the Laclede distribution system. Since this Commission is not bound by prior Commission orders, it is appropriate for this Commission to ask tough questions of its Staff and of the Company.

While on its surface it appears that adequate progress is being made in the replacement of copper service lines, one must have the case background to understand the necessity of the program. Between 1985 and 1990, Staff filed three natural gas incident reports related to Laclede and all three incidents involved corrosion on copper service lines. It is believed that all three of these incidents resulted from de-icing salts corrosively attacking the copper service lines. In a 1991 settlement, Laclede agreed to follow a formal replacement program that included identification and replacement of direct-buried copper service lines in areas of known corrosive environments. Then in 1998, Staff investigated two explosions and resulting fires in Laclede's service area. Staff determined that both incidents were caused by natural gas leaking from corroded sections of copper service lines.

As a result of these investigations, Staff opened this case in 1998 to investigate the adequacy of Laclede's direct-buried copper service line replacement program and the effectiveness of its leak survey procedures. Staff filed a Report on August 31, 1999, that summarizes the incidents in Laclede's service area as follows, "[s]ince November 1985-February 1999, six natural gas incidents involving corrosion on direct-buried copper service lines have resulted in the death of one man, significant bodily burns suffered by a grandmother and her grandson, structural damage to at least six properties, and loss of personal belongings." The danger these copper lines present is evident from the number of serious incidents in this service territory. In many areas of the state, copper lines have been completely removed due to the increased danger associated with their use. It is for these reasons that such lines are scheduled to be removed.

According to the Unanimous Stipulation and Agreement signed by Laclede, Staff and the Office of Public Counsel, Laclede is required, at a minimum, to continue following the guidelines of the agreement until completion of the entire program. Language exists in that agreement allowing for modification of the program if so ordered by the Commission. Allowing the Commissioners time to thoroughly review the filings in the case and ask questions of the parties at an Agenda meeting before a vote to continue this copper line replacement program is within the framework of the Stipulation. The Stipulation does not prohibit updating the program or improving it when necessary. It is incumbent on the commissioners to ensure that the program as it was created in 2000 is appropriate today. When Commissioners raise issues or concerns with a stipulation, it is up to the Staff to make suggestions or proposals. Some have suggested that if Commissioners have concerns with the program, Commissioners should offer specific plans for improvement. When this Commission is permitted to fill its unused Pool Advisory technical staff, Commissioners will be in a position to make those specific recommendations. Until then, the Commission is dependent on the recommendations of Staff.

Additionally, circumstances have changed since this program was implemented in 2000. The legislature has seen fit to authorize the creation of new surcharges which enable the company to charge the ratepayers more for service, and to collect the revenue sooner in time. One surcharge called the Infrastructure System Replacement Surcharge (ISRS) was approved in 2003 and has been applied in several cases. In 2005, two new surcharges were authorized by the General Assembly. Gas companies will be able to apply for surcharges to replace revenue lost from customer conservation and fluctuations in weather. Additionally, gas companies will be able to apply for a surcharge for mandated environmental costs imposed by federal or state regulators. Formerly, each of these costs were part of a normal, traditional rate case, but will now ride separately over and above base rates. The ISRS is specifically designed for this type of infrastructure improvement.

This Commissioner believes that because of the assessment of three new surcharges available to the gas company, the utility should be held to a higher standard when it comes to safety. This Commission should do its own analysis rather than rely on potentially outdated work that began in 1998. The people of this state deserve a Commission willing to improve the performance of its utilities rather than simply grant them additional revenue opportunities without improving service to ratepayers. Leadership is finding improved solutions to problems; not simply rubber stamping another Commission's work.

For the foregoing reasons, this Commissioner dissents.

**In the Matter of the Petition for Arbitration of Unresolved Issues
in a Section 251(b)(5) consolidated with Agreement with T-
Mobile USA, Inc.***

*Case No. TO-2006-0147
Decided February 16, 2006*

Telecommunications §46.1 The Commission resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. It also combined with TO-2006-0151 which resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. These issues include the method of interconnection, appropriate forward-looking cost methodology, and intercarrier compensation.

PRELIMINARY ARBITRATION REPORT

APPEARANCES

W.R. England, Brian T. McCartney and Melissa Manda, Brydon, Swearngen & England, PC, 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102. Attorneys for Petitioners.

Mark Johnson, Sonnenchein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111. Attorney for T-Mobile USA, Inc.

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* See pages 264 and 285 for other orders in this case

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Arbitrator: Kennard L. Jones, Administrative Law Judge

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Walter Cecil, Regulatory Economist II, Utility Operations Division, Missouri Public Service Commission.

Bill Voight, Rate and Tariff Examiner Supervisor, Missouri Public Service Commission.

Marc Poston, Senior Counsel, General Counsel Division, Missouri Public Service Commission.

PROCEDURAL HISTORY

On October 4, 2005, a number of small rural telephone carriers¹ filed petitions for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, United States Code ("the Act"), and Commission rule 4 CSR 240-36.040. The Petitioners in Case No. TO-2006-0147 ask the Commission to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. The Petitioners in Case No. TO-2006-0151 ask the Commission to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. Because the petitions contained common questions of law and fact and many of the same Petitioners,

¹ The carriers filing under Case No. **TO-2006-0147** are BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, *Fidelity Telephone Company*, *Fidelity Communications Services I, Inc.*, *Fidelity Communications Services II, Inc.*, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Green Hills Telecommunications Services, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, Mark Twain Communications Company, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, and Steelville Telephone Exchange, Inc.

The carriers filing under Case No. **TO-2006-0151** BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, *Goodman Telephone Company*, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Green Hills Telecommunications Services, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, Mark Twain Communications Company, *McDonald County Telephone Company*, *Miller Telephone Company*, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, *Ozark Telephone Company*, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, *Seneca Telephone Company* and Steelville Telephone Exchange, Inc.

the Arbitrator consolidated these cases, making Case No. TO-2006-0147 the lead case.

Motion for Summary Judgment

During the course of the proceedings, T-Mobile filed a motion for summary determination of one of the contested issues; whether Petitioners have an "obligation to pay reciprocal compensation on landline (intraMTA) traffic terminated to [T-Mobile] by third-party carriers (such as IXCs) when that traffic is neither originated by, nor the responsibility of Petitioners." T-Mobile pointed out that the Commission, on October 6, 2005, in Case No. IO-2005-0468, rejected Petitioners' position on this issue. Petitioners opposed the motion, stating that there were genuine issues of material fact and that discovery was being conducted with regard to facts that were relevant to this issue.

Commission rule 4 CSR 240-2.117 requires that the pleadings show there is no genuine issue of material fact. Because all of the pleadings did not show there were no genuine issues of material fact, the Arbitrator denied this motion reserving consideration of this issue for this report.

Motion to Dismiss Issues Having to do with Compensation for Past Traffic

T-Mobile and Cingular filed motions to dismiss issues presented by Petitioners having to do with the delivery of past traffic and the related compensation. The Arbitrator initially granted the motions. However, upon reconsideration he set the ruling aside recognizing the state Commission's federally mandated obligation to consider all issues presented.²

Commission rule 4 CSR 240-36.040(19)

This rule states that "[u]nless the results would be clearly unreasonable or contrary to public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue." The arbitrator finds that several issues cannot be resolved in favor of one party or the other because the results are clearly unreasonable. The Arbitrator will, therefore, adopt a reasonable position.

STATEMENT OF FINDINGS AND CONCLUSIONS

Issue No. 1 – Must each Petitioner establish its own separate transport and termination rate based upon its own separate costs?

Petitioners - Each Petitioner has performed a cost study using the HAI Forward-looking costs model and developed a proposed rate based on its forward-looking costs. These costs average \$0.0871 for T-Mobile and \$0.0843 for Cingular. However, Petitioners have agreed to a lower rate of \$0.035 with other wireless carriers in Missouri. Therefore, Petitioners have proposed the use of this \$0.035 rate in this arbitration. FCC rules do not prohibit a uniform rate for all Petitioners where, as here, it is no greater than their forward-looking costs.

T-Mobile/Cingular – Each Petitioner must establish its own transport and termination rate based upon specific forward-looking economic costs. The Act and FCC Rules do not allow a blanket rate to apply to all Petitioners.

² 47 U.S.C Section 252(b)(4)(C).

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Arbitrator's Decision – No. Each Petitioner need not establish separate transport and termination rates. However, each Petitioner must establish separate costs. The rates must then be based on such costs.³

Issue No. 2 – What is the appropriate transport and termination rate for each petitioner?

The Arbitrator's resolution of this issue is dependent upon the results of the revised cost studies the parties are directed to run.

Issue No. 3 – What are Petitioners' forward-looking costs to purchase and install new switches?

Petitioners – Although the default input for this value is \$416.11 per line, Petitioners recommend that the value be increased to \$520.14 per line based on review of this factor in the past and the resulting investment compared to actual investments. Petitioners further argue that even at this level, the HAI results for small Missouri Companies are about 28% less than current actual investment.⁴

T-Mobile/Cingular – Petitioners have used an inflated value for this cost by first increasing by 25% the HAI default value, which is based on switch costs from 1995. It is generally recognized that switch prices have declined since 1995. Additionally, the \$520.14 per line, suggested by Petitioners, was based on embedded investment in switches, while publicly available information shows significantly lower costs. Respondents suggest \$76.56 per line plus adjustments to fill factors and removal of power plant investments.⁵

Arbitrator's Decision: The Arbitrator adopts the T-Mobile/Cingular position. HAI uses 1995 costs, which Schoonmaker doesn't accept. Instead, he makes an arbitrary adjustment to bring the HAI costs in line with the actual investment or embedded costs for switches.

Issue No. 4 – What is the appropriate value for the usage-sensitive portion of Petitioners' forward-looking end office switching cost?

Petitioners – The HAI Model's input value assigns 70% of switch costs to usage sensitive costs. This is consistent with the FCC's Tenth Report and Order in CC Docket 96-45 and the FCC's "MAG Order."⁶

T-Mobile/Cingular – Because of changes in technology and vendor pricing for switches, usage-sensitive costs for switches have fallen dramatically. The current version of HAI uses a 0% end office, non-port fraction. A Virginia arbitration order says 0% usage sensitive costs are appropriate. No additional costs resulting from use of switch are appropriate except interoffice trunk equipment, which is effected by traffic amount offices. No more than \$18.33 per line is usage sensitive.⁷

Arbitrator's Decision: The Arbitrator adopts T-Mobile/Cingular's position. To avoid each LEC having to run costs studies, the "MAG Order" allows an input value of 70% to be assigned to usage sensitive costs of switches, but does not require this treatment. The FCC made that decision because it was developing a nation-

³ 47 C.F.R. §51.505(e).

⁴ Schoonmaker Direct, page 24, Lines 11-15.

⁵ Conwell Direct, Page 31, Lines 3-14 – Page 46, 9.

⁶ Schoonmaker Rebuttal page 17 – 18.

⁷ Conwell Direct, page 47.

wide mechanism and wanted to avoid the numerous costs studies that would have had to have been performed. The values assigned in the MAG are overly-broad.

Issue No. 5 - What is the appropriate floor space attributable to switching?

Petitioners – The HAI Model's input for floor space should be adopted because it reflects an appropriate amount of building and land investment.⁸

T-Mobile/Cingular – Absent a determination of the floor space required for stand-alone/host switches and remote switches with current technologies, floor space should be derived from the response to data request for Cass County Telephone, which is 200 sq. ft for stand-alone/host switches (four bays) and 100 sq. ft for remotes (two bays).⁹

Arbitrator's Decision: The Arbitrator adopts T-Mobile/Cingular's position. When compared to Petitioners' response to data requests, Petitioners' position is clearly unreasonable. Further, Respondent increases the floor space information provided by Petitioner, Cass County.

Issue No. 6. – What is the appropriate Minutes of Use (MOU) forward-looking and office switching cost for all Petitioners?

Petitioners - \$.0092 for T-Mobile Petitioners and \$.0010 for Cingular Petitioners.

T-Mobile/Cingular - \$.0012 per minute.

Arbitrator's Decision – Depends on cost studies being re-run.

Issue No. 7 – What are Petitioners' appropriate, forward-looking interoffice cable lengths?

Petitioners – Interoffice cable lengths are based on HAI forward-looking model assumptions that assume, in a forward-looking network, that the RBOC would not build facilities to Petitioners' exchanges, as had been the case historically.¹⁰

T-Mobile/Cingular –Petitioners' switches should be assumed to remain in current locations and the existing interoffice cable distances among these switches should be used to compute transport costs. The distance between Petitioners' switches and the meet points should reflect actual distance.¹¹

Arbitrator's Decision: The Arbitrator adopts T-Mobile's position. However, under Commission rule 4 CSR 240-36.040(19), this decision is conditioned on cables going to the nearest switch; not necessarily the nearest SBC switch, but the nearest large LEC tandem switch.

Issue No. 8. What are the appropriate cable sizes?

Petitioners – The HAI input of 24 fiber cable to connect offices should be used. The HAI model assumes a hypothetical, forward-looking network, and it would not be cost effective or forward-looking to place smaller cables.

T-Mobile/Cingular – Petitioners incorrectly assume that they all employ 24-fiber cable for all interoffice cable. Fiber cable sizes should be determined for each Petitioner's network based on their total demand for fibers per FCC rule 51.505, with smaller cable sizes used as appropriate. Absent additional Petitioner-specific cost data, a mix of 8, 12 and 24-fiber cables should be used in the cost studies.

⁸ Schoonmaker Rebuttal Page 22-23.

⁹ Conwell Direct, pg 53.

¹⁰ Schoonmaker Rebuttal pg 24-29.

¹¹ Conwell Direct, p 59.

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Arbitrator's Decision: The Arbitrator adopts Petitioners' position. It is reasonable to assume that in a forward-looking network traffic will increase. In light of this assumption, it is reasonable to assume that larger cable will be needed. If the forward-looking cable sizes are underestimated, then it will cost more to correct.

Issue No. 9. What is the appropriate amount of sharing of Petitioners' interoffice cabling in order to reflect sharing with services other than transport and termination?

Petitioners – The HAI Model assigns the entire cost of interoffice fiber cable to transport, with a portion of the cost assigned to structures.¹²

T-Mobile/Cingular – FCC Rule 51.511 requires unit costs to reflect total costs of a network element divided by (shared among) total demand for the element. Petitioners' cost studies allocate the entire cost of the 24-fiber interoffice cable to the transport system, rather than sharing the cable cost among loops, leased fibers and others. Petitioners' cost studies should be corrected to assume six fibers for interoffice transport systems – two working and four spare, based on the experience of Cass County Telephone.¹³

Arbitrator's Decision: The Arbitrator adopts Petitioners' position. Although Respondents point out faults in the Petitioners' position, using Cass County as an example, they have not offered their methodology for their position.

Issue No. 10. What is the appropriate sizing of Petitioner's forward-looking, interoffice transmission equipment?

Petitioners – HAI input values for transmission equipment.¹⁴

T-Mobile/Cingular – Petitioners incorrectly assume that they all employ an OC48 add/drop multiplexer, an OC3 terminal multiplexer and a digital cross connect system, and that optical regenerators are employed every 40 miles of interoffice cable routes T-Mobile/Cingular contend that the lengths of these routes are overstated due to the assumed interoffice cable lengths in Issue 7. Transport transmission equipment should be sized to serve the total demand for DSI equivalent circuits at each Petitioners' switch and reflect either fiber ring or point-to-point transport, depending on the Petitioner's network design. Because Petitioners have not provided requested data, the Commission should assume OC3 sized systems and no need for optical regenerators.

Arbitrator's Decision: The Arbitrator adopts Petitioners' position of the HAI default of OC48 because Petitioners' position is forward looking. To the extent that the transmission equipment is mileage dependent, the parties shall use the mileage determined in Issue No. 7.

Issue No. 11. What are the appropriate, forward-looking common transport costs for each Petitioner?

Petitioners – Schedules RCS-4 and 5 and are the sum of the Common Transport and Dedicated Transport elements.

T-Mobile/Cingular – 20 Petitioners have produced enough information to allow appropriate common transport costs to be computed. Exhibit WCC-1 to Direct Testimony of Conwell. As to the 7 that have not produced data, See, Issue 2.

¹² Schoonmaker direct, p 24-25.

¹³ Conwell Direct p 69.

¹⁴ Schoonmaker Rebuttal, pgs 35-36.

Arbitrator's Decision – Will be based on results of rerunning costs studies with recommendations.

Issue No. 12. Should any of the costs identified in HAI as dedicated transport be included in Petitioners' transport and termination rates?

Petitioners – Yes. The dedicated transport costs in the HAI model should be included in the Petitioners' transport and termination rates as part of the common transport cost.¹⁵

T-Mobile/Cingular – No. Including dedicated transport costs is duplicative of common transport costs. The corrections for common transport, described in Schedule WCC attached to the direct testimony of Conwell, accurately measure transport costs and it is unnecessary to add additional costs.¹⁶

Arbitrator's Decision: Both parties agree traffic is allocated to common transport. Only costs attributed to common transport should be included in the cost calculation. Schoonmaker, the Petitioners' witness, states that the HAI calculates the total cost of the facility and then allocates the cost to various types of transport facilities such as special access, local interoffice, operator service, common trunks and dedicated trunks. However, Schoonmaker adjusts the assumptions to include dedicated transport, but does not add back in special access, local interoffice, operator service, etc. No explanation was given for only limiting the adjustments to dedicated transport. Therefore, the Arbitrator finds that only common transport should be included.

Issue No 13. What is the appropriate value of Petitioners' forward-looking signaling link costs?

Petitioners – For companies similar to the Petitioners, HAI uses a simplified investment input that it based on an amount per line per wire center so signaling investment is totally unrelated to distance, cable sizes, cable sharing, etc.¹⁷ Cost are displayed in RCS-4 and 5.

T-Mobile/Cingular – HAI assumes there is a pair of signaling links for every Petitioners' switch, which is not the case in reality. HAI assumes the signaling links run over the same fictitious interoffice cable routes as common transport (i.e. a cable route from each petitioner switch to the nearest BOC switch). To correct that assumption, Respondents used the actual current costs Petitioners are paying for SS& interconnection links divided by the HAI estimates of number of messages.¹⁸

Arbitrator's Decision – Because it is forward looking, the Arbitrator adopts Petitioners' position, using however, the distances established in Issue No. 7.

Issue No. 14. Upon what basis should Petitioners and Cingular and T-Mobile compensate each other for traffic exchanged between February of 1998 and the 2001 effective date of Petitioners' wireless termination service tariffs?

Commission will not address this issue. It is not relevant to the contemplated interconnection agreement. This issue is better addressed in the context of a complaint case.

¹⁵ Schoonmaker Direct p 32-33.

¹⁶ Conwell Direct p 84-85.

¹⁷ Schoonmaker Rebuttal p 38.

¹⁸ Conwell Direct, pgs 87-89.

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Issue No. 15. Must Petitioners pay Cingular and T-Mobile reciprocal compensation for intraMTA, wireline to wireless traffic that they hand off to interexchange carriers?

Petitioners – Petitioners have no obligation to pay reciprocal compensation on landline traffic terminated to Respondents by third-party carriers (such as IXC) where that traffic is neither originated by, nor the responsibility of Petitioners. This is consistent with the Act, FCC rules, industry practice and numerous Commission-approved agreements between small rural ILECs and Wireless Carriers.

T-Mobile¹⁹ - The PSC has already rejected Petitioner's argument, ruling in its Alma/T-Mobile Arbitration Report that FCC rules do not include such an exemption. The reciprocal compensation obligation applies to all intraMTA traffic regardless of the type of intermediate carrier used to deliver the traffic for termination.

Arbitrator's Decision: The Arbitrator adopts T-Mobile's position. As the Commission has recently decided in the recent Alma/T-Mobile Arbitration, 47 C.F.R. §51.703 requires reciprocal compensation arrangements.

Issue No. 16. Should the Commission establish an IntraMTA Traffic Ratio for use by the parties in billing the termination of traffic?

Petitioners – If the Commission finds that Petitioners have an obligation to pay reciprocal compensation on IXC traffic, then the appropriate traffic factor should be reflective of actual traffic flows as calculated by Petitioners.

T-Mobile/Cingular – Cingular and T-Mobile lack the capability to measure all ICO traffic. Therefore, it is standard industry practice to establish a traffic ratio that Cingular and T-Mobile can apply to the traffic they are billed for by the ICO – to determine the amount of traffic for which the ICO owes reciprocal compensation to Cingular and T-Mobile.

Arbitrator's Decision: Yes, because reciprocal compensation should be established.

Issue No. 17 – What is the appropriate IntraMTA traffic balance ration/percentage?

Petitioners – Schedule RCS shows 84/16 for T-Mobile and 83/17 for Cingular.²⁰ This is based on the average of the actual Missouri traffic studies performed by Petitioners of Cingular and T-Mobile traffic.

T-Mobile – T-Mobile's studies, as reasonably adjusted for the traffic that could not be measured, establishes an average traffic ratio of 65% mobile-to-land and 35% land-to-mobile.

Cingular – The appropriate intraMTA traffic ratios for Cingular are listed on Confidential Schedule B to the Direct Testimony of Eric Pue.

Arbitrator's Decision: With regard to **T-Mobile**, both T-Mobile and Petitioners want to use averages. However, Petitioners' average is based on actual traffic studies. T-Mobile's is based on actual, reduced traffic. The Arbitrator adopts Petitioners' position.

With regard to **Cingular**, both Petitioners and Cingular agree on the ratio, however, Petitioners want to use an average, while Cingular wants to use individual company ratios. Because Cingular's position is more accurate, the Arbitrator adopts Cingular's position.

¹⁹ Cingular takes no position on this issue.

²⁰ Schoonmaker Direct, p. 52-53.

Issue No. 18 – Should the agreement allow for modification of the intraMTA traffic ratio?

Petitioners – No objection to this.

T-Mobile/Cingular – If the party can demonstrate, through proper traffic study, that the traffic ratio has changed, then the agreement should allow for modification of the ratio.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 19. Should Cingular and Petitioners employ bill-and-keep for compensation purposes if the traffic exchanged between them does not exceed 5000 minutes of use?

Petitioners – Petitioners should be compensated for all of the traffic they transport and terminate for wireless carriers. Cingular's approach would allow it to terminate calls freely to some of the Petitioners. Also because Petitioners remain rate base and rate of return regulated, any amount of their costs of service that is not recovered from Cingular would have to be recovered from other customers. In the direct testimony of Mr. Schoonmaker, Petitioners agree to accept quarterly billing.

Cingular – Requiring the parties to bill for amounts under 5000 MOUs per month is not cost-effective. The bills would only be \$10-\$70 per month. When exchange traffic amounts are below 5000 MOUs per month, the parties should exchange traffic on a bill-and-keep basis.²¹

Arbitrator's Decision – Balancing Petitioners' argument that it should be compensated for calls terminated by Cingular and Cingular's position that it is not cost effective to compensate Petitioners if the minutes of use is below 5,000, the Arbitrator finds that no bills under 5000 MOU should be issued by Petitioners, unless at least three months have passed and no compensation has been made. The resolution of this issue entails and is consistent with the resolution of Issue No. 33.

Issue No. 20. Should Petitioners be required to provide local dialing for calls to a Cingular NPA/NXX rate centered in Petitioners' EAS calling scopes?

Petitioners – OK as long as Cingular has local interconnection in the wire center or exchange to which Petitioners have EAS. Routing is burdensome like in LNP cases.²²

Cingular – Local dialing parity is required by §251(b)(3) of the Act and by 47 C.F.R. §51.207. Thus, Petitioner must provide local calling for calls to wireless numbers rate-centered in Petitioners' local calling areas, including any EAS areas.

Arbitrator's Decision: The parties offer no proposed language to the interconnection agreement. The Commission will not rule on this issue. Cingular may later file a complaint if it believes the Petitioners are unlawfully discriminating against it. Although Cingular's witness Mr. Pue references Cingular proposed language in Section 3.2, it does not appear in the record.

Issue No. 21 – Should Petitioners be required to accept and recognize as local all calls from/to Cingular subscribers who have been assigned numbers

²¹ Pue direct p 20.

²² Schoonmaker Direct, Pgs 61-62.

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that are locally rated in Petitioners' switches, if Cingular does not have direct interconnection to those switches?

Petitioners – Petitioners oppose Cingular's proposed language because it would require Petitioners to transport calls outside of their service area – an outcome that would be unduly economically burdensome. Calls from Petitioners' service area to Cingular are currently carried by IXCs. Petitioners do not have facilities outside of their service area nor do they have the certificate or tariff authority to carry traffic beyond their exchanges. This issued is currently an "open" issue before the FCC in CC Docket No. 01-92, and it has been addressed recently by the Missouri Commission in a number of cases involving local number portability.

Cingular – The requirement of local dialing parity, established by §251(b)(3) of the Act and 47 C.F.R. §51.207, and the requirement to provide both direct and indirect interconnection, required by §251(a)(1) of the Act, means that Petitioners must recognize local numbers in their switches whether or not a direct interconnection trunk has been established. See *Atlas Telephone Co. v. Okla. Corp. Com'n*, 400 F.3d 1256, 1268 (10th Cir. 2005).

Arbitrator's Decision: The parties offer no proposed language to the interconnection agreement. The Commission will not rule on this issue. Cingular may later file a complaint if it believes the Petitioners are unlawfully discriminating against it. Mr. Pue references Cingular proposed language in Section 3.2, however, it does not appear in the record.

Issue No. 22 – Should the Cingular contract contain provisions for both direct and indirect interconnection?

Petitioners – No. Neither Cingular nor the Petitioners have requested direct connection, so there is no reason for the agreement to address direct connection. Furthermore, direct interconnection is covered by Section 251(c) of the Act, and Petitioners currently have a rural exemption from this obligation under Section 251(f) of the Act. Thus, Cingular is required to issue a bona fide request for termination of Petitioners' rural exemption pursuant to Section 251(f) of the Act, and the Commission must issue such an order before a Petition for Arbitration is filed. 47 U.S.C §251(f); see also 4 CSR 240-36.040(2).

Cingular – Yes. Both the Act §252(a)(1), and 47 C.F.R. §20.11 require the ICOs to provide both direct and indirect interconnection. Petitioners may not refuse to include direct interconnection provisions in the contract.

Arbitrator's Decision: The parties offer no proposed language to the interconnection agreement. The Commission will not rule on this issue. Cingular may later file a complaint if it believes the Petitioners are unlawfully discriminating against it. Although Mr. Pue, Cingular's witness, references Cingular's proposed language in Section 3.3, 3.4, 3.5, 3.6, 3.7, 21.1, it does not appear in the record.

Issue No. 23 – Should Petitioners be entitled to claim the Rural Exemption?

Petitioners – Yes. Petitioners currently have a rural exemption under Section 251(f) of the Act. If Cingular wants a direct connection, then it is required to issue a bona fide request for termination of Petitioners' rural exemption pursuant to Section 251(f) of the Act. Cingular has not yet done so, and the Commission must issue an order before a Petition for Arbitration is filed.

Cingular – This arbitration is limited to Petitioners' obligation arising under Section 251(a) and (b) of the Act. The rural exemption of Section 251(f)(1) applies only to obligations imposed by section 251(c) of the Act. Thus, the rural exemption is irrelevant to this proceeding.

Arbitrator's Decision: Commission rule 4 CSR 240-36.40(2) states:

If the incumbent local exchange carrier is a "rural carrier" subject to the rural exemption contained in 47 U.S.C Section 251(f), then a commission order terminating the rural exemption must precede any petition for arbitration.

In order for this to have been an issue, Cingular would have had to petition the Commission to terminate the rural exemption Petitioners now have. Cingular has not done so and the Commission has not issued an order terminating the rural exemptions of Petitioners. Although, this issue is irrelevant, as Cingular argues, Petitioners still have a rural exemption.

Issue No. 24 - Can CLECs seek arbitration of interconnection agreements with Cingular?

The Commission has dismissed the CLECs from this arbitration. This issue is moot.

Issue No. 25 – Upon what basis should Petitioners and T-Mobile compensate each other for traffic exchanged between 2001 and the BFR date.

This issue is not relevant to the formation of the contemplated interconnection agreement and is better addressed in the context of a complaint case.

Issue No. 26 – Should the Arbitrator authorize the Petitioners and all transit providers to block T-Mobile's traffic until the past compensation issue are resolved?

This issue is not relevant to the formation of the contemplated interconnection agreement and is better addressed in the context of a complaint case.

Issue No. 27 – What InterMTA factors should be established for the interconnection agreement?

Petitioners – The parties have reached agreement on InterMTA factors.

T-Mobile – T-Mobile has agreed to the ILEC-specific interMTA factors set forth by the Petitioner in Appendix G to the Petition.

Arbitrator's Decision – The parties agree on this issue.

Issue No. 28 – Within the traffic deemed InterMTA by applying the agreed InterMTA factor, how should inter- and intra-state InterMTA traffic be addressed?

Petitioners – Petitioners proposed the same ratio of 80% intrastate and 20% interstate that Petitioner (and other small rural ILECs in Missouri) have agreed to with Cingular and other Missouri wireless carriers. Because interstate calls are typically routed to IXCs for termination to ILECs, the preponderance of calls routed over the transit facilities of SBC would be intrastate.

T-Mobile - The interconnection agreement should include an interstate/intrastate allocation of the InterMTA traffic. A reasonable allocation is 80% interstate, 20% intrastate.

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Arbitrator's Decision: The Arbitrator finds in favor of Petitioners because Petitioners' position is supported by T-Mobile's own data.²³

Issue No. 29 – Should the interconnection agreement include an explicit statement that the compensation obligation for intraMTA traffic is reciprocal and symmetrical?

Petitioners – Petitioners have no objection to including language in the Agreement to the effect that the reciprocal compensation obligation for intraMTA traffic is reciprocal and symmetrical.

T-Mobile – By federal law, the obligation to pay compensation for IntraMTA traffic is reciprocal and symmetrical.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 30 – Should the interconnection agreement clarify which carrier pays for the trunks and associated costs of connecting each party's network with the third-party transit network?

Petitioners – Petitioners have no objection to including language in the agreement which clarifies that each originating carrier is responsible for paying for any trunks and associated costs it may incur in connecting its network with a third-party transit carrier's network.

T-Mobile – Consistent with the PSC's Alma decision, the agreement should explicitly state that any transport costs for intraMTA traffic are paid for by the originating carrier or its agent – and not by the terminating carrier.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 31 – Should the interconnection agreement require the parties to send all traffic via a third-party LEC when the parties are indirectly interconnected?

Petitioners – No. The Agreement should not require the parties to send all traffic they exchanged via third-party LEC when the parties are indirectly interconnected.

T-Mobile – No. The originating carrier (whether LEC or CMRS carrier) has the right to determine what intermediary carrier to use in sending traffic to the terminating carrier.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 32. What billing mechanism should be used to reflect the IntraMTA traffic balance percentage?

Petitioners – If the Commission adopts a traffic factor for intraMTA traffic (#16 and 17), then a net billing arrangement is appropriate. A net billing arrangement is only appropriate, however, for intraMTA traffic. InterMTA traffic, if any, should be identified and removed from total terminating usage before performing a net billing calculation on the remaining intraMTA minutes of use.

T-Mobile – Applying the traffic balance percentage, T-Mobile may accommodate either net billing or cross-billing, both of which present a practical means to efficiently bill under an interconnection agreement.

Arbitrator's Decision: Both parties agree to net billing. However the Arbitrator emphasizes that net billing should only include intraMTA traffic not interMTA traffic.

Issue No. 33 - Should billing be deferred until the amount owing equals at least \$250?

²³ Pruitt Direct, Attachment 1.

Petitioners – Petitioner do not object to a deferred billing arrangement whereby they would not render a bill totaling less than \$250, but rather accumulated billing information and render one bill for multiple billing periods when the total amount due exceeds \$250; provided, however that the billing party shall render a bill at least once per quarter, even if the bill is for less than \$250.

T-Mobile – Requiring parties to bill for amounts under \$250 is inefficient for both parties. No late charges or interest should apply to deferred billings.

Arbitrator's Decision: The Arbitrator reaches a conclusion that is consistent with issue No. 19 where Petitioners indicate they are willing to accept quarterly billing. If the monthly billing is less than \$250, the parties should continue to accumulate MOUs. However, accumulating MOUs will not be allowed for more than three months at a time.

Issue No. 34 – Should the interconnection agreement include call-blocking as a remedy for a dispute between the parties.

Petitioners – Yes. It is standard industry practice for a party to be able to terminate service to the other party for failing to comply with the terms of an agreement, including failure to pay undisputed amounts. Blocking provisions have been approved by this Commission for wireless traffic that is delivered without payment. See 4 CSR 240-29.120, Case No. TT-2001-139, 112 S.W.3d 20 (Mo. App. 2003).

T-Mobile – No. The parties agree to apply late charge(s) to disputed payments under the agreement. Call blocking is not needed as a remedy and is contrary to the public interest. If allowed, it should be subject to proper regulatory preapproval, the late fees should be deleted, and the call-blocker(s) should pay the costs of blocking and unblocking.

Arbitrator's Decision: The Arbitrator adopts Petitioners' position. Commission rule 4 CSR 29.120 sets out the requirements for call-blocking. Any language in the agreement must be consistent with this rule.

Issue No. 35 What should be the effective date of the agreement?

Petitioners – April 29, 2006, is the effective date for the agreements, but this effective date should not prohibit Petitioners from being compensated for pre and post tariff traffic sent to Petitioner by T-Mobile and it should not relieve T-Mobile from complying with Commission orders and tariffs.

T-Mobile – April 29, 2006

Arbitrator's Decision – April 29, 2006

Issue No. 36 – Is the transit rate issue raised by Citizens a proper subject of this arbitration?

Petitioners – Yes, Citizens Telephone performs a transiting function for another small rural carrier, Alma. It is appropriate for Citizens to receive compensation for the transiting functions that it performs on T-Mobile's behalf for calls from T-Mobile to Alma. The \$0.01 per minute rate proposed by Citizens has been agreed to by a number of other wireless carriers, including most recently Cingular and U.S. Cellular. This rate is consistent with the prevailing market rate.

T-Mobile – No. Under Section 252(b)(4)(A), the PSC may only consider issues raised in the arbitration petition, and under Section 252(c)(2), the PSC can only

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adopt rates that are consistent with the TELRIC rules. This issue was not raised in the petition, and Petitioners have not provided any supporting cost data.

Arbitrator's Decision: This issue was not presented in the petition. Furthermore, the record is not sufficiently developed to address whether a \$.01 transiting rate is appropriate. The Commission will not rule on this issue.

**In the Matter of the Application of SBC Advanced Solutions,
Inc., for a Name Change.**

*Case No. XN-2006-0308
Decided February 21, 2006*

Telecommunications §1. The Commission approved a request, changing the name of SBC Advanced Solutions, Inc., to SBC Advanced Solutions, Inc. d/b/a AT&T Advanced Solutions.

**ORDER RECOGNIZING NAME CHANGE
AND APPROVING TARIFF SHEETS**

On January 25, 2006, SBC Advanced Solutions, Inc., filed an application with the Public Service Commission seeking a change of name from SBC Advanced Solutions, Inc., to SBC Advanced Solutions, Inc., d/b/a AT&T Advanced Solutions. With the application for name change, SBC also filed adoption notices and revised tariff pages with effective dates of February 24, 2006, for YX-2006-0577, and March 2, 2006, for YX-2006-0585 and YX-2006-0586. Further, SBC included with its initial filing a registration of fictitious name filed with the Missouri Secretary of State.

The Staff of the Commission filed a recommendation and memorandum on February 10, 2006, stating that it had reviewed the applicant's filing and proposed tariff sheets and had no objection to their approval. The Staff recommended that the new name be recognized and that the proposed tariff sheets be approved to become effective on February 24 and March 2, 2006.

The Commission has reviewed SBC's filing, the proposed tariff sheets, and Staff's recommendation and finds that the new name should be recognized. The Commission further finds that the proposed tariff sheets reflecting the name should be approved.

IT IS ORDERED THAT:

1. The new name of SBC Advanced Solutions, Inc., d/b/a AT&T Advanced Solutions is recognized.
2. The following tariff pages, Tariff File No. YX-2006-0577, are approved to become effective February 24, 2006:

**SBC Advanced Solutions, Inc., d/b/a AT&T Advanced Solutions
Missouri P.S.C. No. 3
Original Adoption Sheet
1st Revised Title Page, Replacing Original Title Page**

3. The following tariff pages, Tariff File Nos. YX-2006-0585 and YX-2006-0586, are approved to become effective March 2, 2006:

SBC Advanced Solutions, Inc., d/b/a AT&T Advanced Solutions

MO P.S.C. No. 1

Original Adoption Sheet

2nd Revised Sheet 1, Replacing 1st Revised Sheet 1

MO P.S.C. No. 2

Original Adoption Sheet

2nd Revised Sheet 1, Replacing 1st Revised Sheet 1

4. This order shall become effective on February 24, 2006.

5. This case may be closed on February 25, 2006.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Reed, Regulatory Law Judge

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**In the Matter of the Joint Application of Fidelity Natural Gas, Inc.,
and Laclede Gas Company for an Order Authorizing the Sale
and Transfer of Certain Assets of Fidelity Natural Gas, Inc.,
Located in Missouri to Laclede Gas Company and Either
Authorizing the Transfer of Existing Certificates of Public
Convenience and Necessity or Granting a New Certificate
of Public Convenience and Necessity to Laclede Gas Com-
pany in Conjunction with Same.**

*Case No. GM-2006-0183
Decided February 21, 2006*

Gas §§3, 6. The Commission approved the sale of assets of Fidelity Natural Gas, Inc., to Laclede Gas Company with certain conditions agreed to by the parties and granted a certificate of convenience and necessity to Laclede Gas Company to operate in the service area of Fidelity Natural Gas, Inc.

**ORDER APPROVING UNANIMOUS STIPULATION AND
AGREEMENT FOR THE SALE OF ASSETS AND GRANTING A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

Syllabus: This order approves the sale of assets of Fidelity Natural Gas, Inc., to Laclede Gas Company with certain conditions agreed to by the parties and grants a certificate of convenience and necessity to Laclede Gas Company to operate in the service area of Fidelity Natural Gas, Inc.

On October 21, 2005, Fidelity Natural Gas, Inc., (Fidelity) and Laclede Gas Company (Laclede) filed a joint application seeking the Commission's authority for Fidelity to sell and transfer to Laclede certain assets of Fidelity located in Missouri. They also requested that the Commission approve the transfer of, or grant new, certificates of public convenience and necessity, allowing Laclede to provide gas service as a public utility in the service areas currently served by Fidelity.

On October 25, 2005, the Commission notified the general public and potentially interested parties of their opportunity to intervene. No party sought to intervene or request a hearing.

On February 1, 2006, the Commission conducted a local public hearing in Sullivan, Missouri. On February 14 all parties to the case, the Staff of the Commission, the Office of Public Counsel, Fidelity, and Laclede, filed a Unanimous Stipulation and Agreement disposing of all issues in the case. A copy of the stipulation is attached to this order and is incorporated herein by this reference. The Staff filed Suggestions in Support of the Unanimous Stipulation and Agreement on February 17, 2006, setting forth its reasons for support of the Stipulation and Agreement.

Fidelity is a gas corporation and public utility organized under the law of Missouri with its principal place of business in Sullivan, Missouri. Fidelity provides natural gas service to approximately 1,300 residential, commercial, and industrial customers in the City of Sullivan, Village of Oak Grove, and unincorporated portions of Crawford and Franklin counties in Missouri.

Laclede is a gas corporation and public utility organized under the laws of Missouri with its principal place of business in St. Louis, Missouri. Laclede serves approximately 630,000 residential, commercial, and industrial natural gas customers in the City of St. Louis and the Missouri counties of St. Louis, St. Charles, Crawford, Jefferson, Franklin, Iron, Ste. Genevieve, St. Francois, Madison, and Butler.

On September 1, 2005, Fidelity and Laclede entered into a Purchase and Sale agreement (the "sale agreement") wherein Fidelity will sell to Laclede all assets necessary to operate the gas business conducted by Fidelity. Those assets are fully described in Appendix 1, which is attached to the joint application and marked "proprietary." Following approval of the sale, Laclede will operate the natural gas business formerly conducted by Fidelity as part of Laclede's Missouri Natural division.

Fidelity and Laclede state in their joint application that they expect no material impact on the tax revenues of the political subdivisions in which their structures, facilities, or equipment are located. They further assert that no Commission approval will be necessary for financing the transaction. Finally, they argue that the proposed transaction will not be detrimental to the public interest.

Section 393.190 RSMo (2000), requires approval by the Commission before a regulated utility disposes of all or any part of its system. According to the sale agreement between the parties, Fidelity plans to sell all of its assets necessary to engage in the natural gas business. The Commission will approve such a sale of assets if it is shown that the sale is not detrimental to the public interest.

Upon review of the application and attachments filed by Fidelity and Laclede, the Unanimous Stipulation and Agreement, and the Staff's recommendation, the Commission finds that the sale of Fidelity's assets, described in Appendix 1 to the joint application, is not detrimental to the public interest and will be approved subject to a number of conditions agreed to in the Unanimous Stipulation and Agreement. The Commission further finds that Laclede should be granted a certificate of convenience and necessity to operate the natural gas business in the service area currently served by Fidelity.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed on February 14, 2006, attached hereto and incorporated herein, is approved and the signatory parties are ordered to comply with its terms.
2. The sale of assets by Fidelity Natural Gas, Inc., to Laclede Gas Company described in their sale agreement of September 1, 2005, is approved, subject to the conditions set forth in the Unanimous Stipulation and Agreement filed on February 14, 2006.

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3. Fidelity and Laclede are authorized to perform in accordance with the terms of their sale agreement and enter into and execute any documents reasonably necessary to the performance of the sale agreement.

4. Fidelity is authorized to transfer to Laclede all property rights, privileges, immunities and obligations of Fidelity, as described in the sale agreement between the parties.

5. Laclede is granted a certificate of convenience and necessity to conduct natural gas service in the service area currently served by Fidelity.

6. Fidelity is authorized to terminate its responsibilities as a gas corporation in Missouri effective on the effective date of this order.

7. Laclede is authorized to provide gas service in the areas previously served by Fidelity in accordance with the existing rules, regulations, rates, and tariffs of Fidelity as may be on file with and approved by the Commission from the effective date of the sale agreement until the effective date of a Commission order in Laclede's next general rate case or until the Commission orders otherwise.

8. This order shall become effective on February 24, 2006.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Reed, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Tariff Filing of Aquila, Inc., to Implement a
General Rate Increase for Retail Electric Service Provided
to Customers in Its MPS and L&P Missouri Service Areas.**

*Case No. ER-2005-0436
Decided February 23, 2006*

Electric §20. The Commission found that the stipulation and agreement of the parties was reasonable in that it resolves all disputes between the parties regarding the proposed rate increase.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement submitted by the parties.

On May 24, 2005, Aquila, Inc., submitted proposed tariff sheets (YE-2005-1045) intended to implement a general rate increase for electric service provided to retail customers in its MPS and L&P operating divisions in Missouri. On May 31, the Commission suspended the Company's proposed tariff sheets until April 21, 2006.

On January 31, 2006, Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, the Staff of the Missouri Public Service Commission, the Sedalia Industrial Energy Users' Association, AG Processing, Inc., the City of Kansas City, the Missouri Department of Natural Resources, the Federal Executive Agencies, and the City of St. Joseph filed a nonunanimous stipulation and agreement. That stipulation and agreement resolves all disputes between the parties regarding the proposed rate increase. A copy of the stipulation and agreement is attached to this order as Attachment 1.

Not all parties signed the stipulation and agreement. However, Commission Rule 4 CSR 240-2.115(2) provides that if no party objects to a nonunanimous stipulation and agreement within seven days of its filing, the Commission may treat that stipulation and agreement as unanimous. No party has filed a timely objection to the stipulation and agreement and the Commission will treat it as unanimous.

Staff filed suggestions in support of the stipulation and agreement on February 7. On February 9, the Commission held an on-the-record presentation regarding the proposed stipulation and agreement. At that proceeding, the Commission questioned the signatory parties, as well as those parties that did not sign but did not object to the stipulation and agreement.

As a part of the stipulation and agreement, the parties agreed to specific tariff language that Aquila will file to implement the agreed upon rate increase. That tariff has not yet been filed but the stipulation and agreement asks the Commission to authorize Aquila to file such a tariff. The stipulation and agreement also asks the Commission to allow that tariff, after it is filed, to become effective on March 1, 2006.

The stipulation and agreement provides that interclass revenue responsibility shifts agreed to in this stipulation and agreement will eliminate the need for the

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Commission to issue a decision in a related case, EO-2002-384, which was created to consider such interclass revenue responsibility shifts. The stipulation and agreement also provides that if Aquila funds its VEBA trust in the amount of \$1.4 million, as it has agreed to do in the stipulation and agreement, Public Counsel will dismiss, with prejudice, its complaint against Aquila, now pending before the Commission in Case No. EC-2006-0171.

The stipulation and agreement provides that the Commission shall order Aquila to use the depreciation rates set out in Appendix B to the stipulation and agreement. The Commission will do so. The stipulation and agreement also provides that the Commission is to grant Aquila an Accounting Authority Order regarding the company's hedging arrangements concerning fuel and purchased power costs. Staff recommended specific language for that Accounting Authority Order in its suggestions in support of the stipulation and agreement. The Commission will issue the requested Accounting Authority Order.

The parties further agreed that if the Commission approves the stipulation and agreement without modification or condition, then the prefiled testimony of all witnesses may be included in the record of this proceeding. The Commission will admit such evidence into the record.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.² Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the stipulation and agreement.

DISCUSSION:

In considering any rate increase request, this Commission must balance the need to keep rates affordable to protect the health and welfare of consumers, especially those with fixed or low incomes, with the need to ensure that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have the opportunity to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure.³ Both of these objectives are statutory duties of this Commission.

The tariff that Aquila initially filed would have generated an increase of \$69.2 million in gross annual electric revenue from its Aquila Networks – MPS service area, and an additional \$9.4 million in gross annual electric revenue from its Aquila Networks – L&P service area. The stipulation and agreement provides for a base overall gross annual electric revenue increase of \$38.5 million from its Aquila Networks – MPS service area and \$6.3 million from its Aquila Networks – L&P

¹ Section 536.060, RSMo Supp. 2005.

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

³ See generally, Section 386.610, RSMo 2000.

service area. The stipulation and agreement also provides that the presently existing Interim Energy Charge will end when the new rates go into effect.

Although these rate increases are substantial, the parties, including the Office of the Public Counsel and the AARP, which did not sign the stipulation and agreement, indicated at the on-the-record proceeding that the agreed upon revenue increases are supported by the evidence. The parties also agreed that much of the need for a rate increase is driven by the rapidly increasing cost of the fuel Aquila uses to generate electricity.

Aquila has built a new generation facility known as the South Harper Generating Station. The legal status of that facility has been called into question and Aquila may be required to dismantle that facility in the near future. The stipulation and agreement establishes an amount that Aquila will be allowed to carry on its books as an expense for the construction of that plant. However, it does not authorize Aquila to recover those costs in this case, and it does not place the South Harper Generating Station into the company's rate base. It also does not authorize Aquila to recover any costs associated with dismantling that facility, if that becomes necessary.

Based on the agreement of the parties and the testimony received at the on-the-record presentation, the Commission believes that the parties have reached a just and reasonable settlement in this case.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on January 31, 2006, is approved as a resolution of all issues in this case (See Attachment 1).
2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement.
3. The proposed electric service tariff sheets (YE-2005-1045) submitted on May 24, 2005, by Aquila, Inc., are rejected.
4. Aquila, Inc., is authorized to file the tariff sheets agreed to as part of the Stipulation and Agreement. Aquila, Inc., may request that the tariff sheets be allowed to become effective on March 1, 2006.
5. Aquila, Inc., is ordered to use the depreciation rates set out in Appendix B to the Stipulation and Agreement.
6. Aquila, Inc., is authorized, for accounting and ratemaking purposes, to record in FERC Account 547 or Account 555, as part of fuel cost and purchased power cost, hedge settlements, both positive and negative, and related costs (e.g. option premiums, interest on margin accounts, and carrying cost on option premiums) directly related to natural gas generation and on-peak purchases power transactions made under a formal Aquila Networks – MPS hedging plan when the hedge arrangement is settled. Aquila shall maintain separate accounting in FERC Accounts 547 and 555 to track the hedge settlements and related costs. As required by Financial Accounting Standard No. 133, Aquila shall continue to record these hedge settlements and related costs on a Mark-to-Market basis and make an offsetting regulatory asset or regulatory liability entry in FERC Account 182.3 (asset) or FERC Account 254 (liability) that recognizes the change in the timing of value recognition under Financial Accounting Standard No. 71. There shall be no rate base treatment afforded to the hedging settlements and related costs recorded on the Mark-to-Market basis.

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7. The prefiled testimony of all witnesses is admitted into evidence and is included in the record of this proceeding.

8. This order shall become effective on March 1, 2006.

Davis, Chm., Murray and Appling, CC., concur;

Clayton, C., concur, with separate concurring opinions to follow;

Gaw, C., dissents, with dissenting opinion to follow

Woodruff, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

CONCURRING OPINION OF COMMISSIONER CLAYTON

This Commissioner concurs in the result of the majority Report and Order involving a rate increase for Aquila's electricity services. However, because this rate increase results in an increase of 6.26% for St. Joseph residential customers and of 8.82% for Missouri Public Service residential customers and because of the on-going media coverage of various controversies involving Aquila, additional discussion is warranted on how this case was resolved.

A Stipulation and Agreement has been presented to the Commission with signatures of all parties except the Office of Public Counsel and AARP. No party has filed any objection. As such, the Commission can treat the Stipulation and Agreement as a unanimous agreement. In fact, the only two parties to decline signing onto the Stipulation, agreed with the calculations supporting the rate increase and adjustments to the rate design. Because of this lack of objection, this Commission has no choice but to approve the agreement and anticipate the filing of another rate case after July 1, 2006, as well as to fully adjudicate several other pending matters involving the South Harper generating facility. Those cases will include additional findings as to the prudence of construction decisions as well as evaluations of Aquila's cost of providing service.

Firstly, it should be noted that the two parties who professed to represent residential customers declined to sign the Agreement. The Intervenor who signed the Stipulation either represented business or commercial customers of Aquila, achieving significant reductions in the allocations of the class cost of service or, in the case of Kansas City or the Missouri Department of Natural Resources, represented governmental agencies seeking funding for various low-income programs. The Public Counsel has the statutory responsibility to represent the public or the residential customer while AARP, although a private association, represents the interests of older Missourians within the Aquila service territory.

During the Stipulation hearing, counsel for these two parties described their desire to not sign the Agreement, although they could not oppose the adoption of the Agreement. Both Public Counsel and AARP admitted that the revenue requirement calculations were supported by sufficient evidence which included a significant rise in fuel costs. While parties to a negotiation and compromise are

faced with "give and take" of issues, this Commissioner is concerned that the very groups tasked with advocating on behalf of residential consumers refused to take a position on the Stipulation. They refuse to agree or to object, which sends an unclear message to the Commission and to the public.

The testimony at the Stipulation hearing highlights this Commissioner's concern that the parties do not have the necessary resources to effectively advocate their positions. Public Counsel refused to sign the agreement because of the early July 1, 2006, moratorium date, which will permit a rate case filing within four months. Public Counsel admitted that if Aquila agreed to not file another case in one year that he would have signed the Stipulation and agreed to the rate increase (Tr. 177, 179). He further argued that despite being "short-staffed," his team "had a high degree of confidence in the numbers." (Tr. 180). AARP proclaimed similar concerns and described the benefits of a longer moratorium period. Even Staff referenced the importance of having "a three to four-month window to handle [their] other assignments." (Tr. 164). During the next twelve months, this Commission will be faced with rate cases from Empire, Aquila, Atmos, KCP&L and Missouri-American Water, not to mention the multitude of smaller utilities that visit the Commissioner regularly. Although all the parties indicated their support of the calculations and the data associated with this rate increase, Public Counsel and Staff must have the resources to complete their analysis in all of the tasks assigned to them. Recent proposals to address this issue inadequately deal with the problem as the two independent agencies will be pitted against one another in competition for funding. These proposals fail to produce a viable solution as each agency needs its own independent and adequate funding source.

Secondly, this Commissioner had concerns with the references to a hypothetical generation facility that has financial characteristics similar to the South Harper Plant located in Cass County, Missouri. The parties agree the hypothetical generation plant is not included in the revenue requirement identified in this case nor is the plant added to rate base for future cases. This case results in a rate increase based on a "black box" settlement which is an agreement with a total figure in calculating rates with no declarations as to amounts set aside for operating expenses, capital expenditures, legal costs or any other expense used to properly calculate rates. The references to South Harper are for bookkeeping or accounting purposes only.

In addition, the Commission has been advised that when Staff arrived at its calculations, its numbers did not include any legal expense or other expense associated with the litigation in Cass County. Further, the revenue requirement results excluded any amount for executive bonuses or excessive executive compensation. This Commissioner is satisfied that these costs have been properly excluded from the customers' rates. When an agreement such as this is silent as to allocations of cost and declarations of prudence for certain actions, the public is left without a complete explanation of how their increasing rates have been set.

Lastly, this case represents another example of why utilities should not be reliant on natural gas for power generation for significant amounts of its portfolio. The bulk of this increase comes from the rising costs of natural gas which seems

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to affect everyone, but for many customers, it affects them for both their heating and their electrical needs.

For the foregoing reasons, this Commissioner concurs.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I dissent from the Order in this request by Aquila, Inc. for increases in rates for its customers in both MPS and L&P service territories. This dissent and objection to the Nonunanimous Stipulation and Agreement approved by the majority is primarily due to four points: the allowance in base rates of phantom generation units which include the facility known as South Harper located in Cass County; the failure of the settlement to produce consequences for a fuel mix that relies too heavily on gas fired combustion turbines; the lack of any obvious consequences for the management decisions of Aquila that have resulted in Aquila's recent financial woes; and, the shifting of additional costs onto residential ratepayers at a time when the increasing costs of energy are already making it extremely difficult for many families to make ends meet.

Non-used and Non-existent Generation Units

This agreement places in rate base a gas-fired combustion turbine generating facility with around 500 MW of capacity. Approximately 300 MWs are based upon what Staff deems to be prudently incurred costs of the South Harper facility. An additional 200 MWs more or less represent what Staff believes would be the prudently incurred cost of adding an additional two combustion turbines to that same location.

Section 393.135 RSMo 2005 states:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

This section was established by initiative petition in 1976. Also known as Proposition One, it was adopted at a time when many in the state were upset with increasing utility rates caused in part by construction costs of new plants being passed on to consumers prior to the plants being used and useful and without the scrutiny of the prudence of those costs that after the fact reviews bring.

In this case the South Harper facility does not appear to meet the requirements of §393.135. After months of litigation as to its siting and operation, the Cass County Circuit Court has ordered the plant shut down and has slated it for deconstruction. While it is possible that authority could be received from either Cass County or the Missouri Public Service Commission that would change the outcome of the future operation of this facility, it is clear that at the time of this decision the facility is not and cannot be used for service as required by law. Yet the parties to the Stipulation have attempted to create a new mechanism for accomplishing exactly the same

result in rates and rate base as would occur if the facility were fully operational. Furthermore, the Stipulation adds two more units that do not exist and places them in rate base as well. Therefore, this Order provides for the inclusion of some facilities that are not used and useful and it includes others that do not exist at all.

This Order sets a precedent which in effect erases §393.135. As stated, the legal logic used places a phantom plant in Aquila's rate base to account for the South Harper facility which cannot be in rate base and includes additional fictional generation as well to replace an expiring contract for generation at the Calpine-owned Aires plant. Why can't this same logic be used in any case before the Commission to place any surrogate plant in rate base that may be contemplated or under construction even though the actual facilities could not be in rate base under law? Some might argue that in light of Aquila's situation with the South Harper facility it is understandable that the parties would attempt to be inventive in assisting Aquila out of its self-made predicament. But, this Commission cannot ignore the law nor should it set such a precedent.

Aquila's Over-Dependence On Gas

It has been established that Aquila's fuel mix in the MPS territory relies too heavily on gas generation. This fuel mix of MPS comes as a result of Aquila's decisions not to invest in base load generation units for the past several years but instead to purchase power by contract or build additional gas fired peaking units. A significant portion of the increase in rates in this case is due to the increased cost of natural gas. Two major electric companies in this state have previously invested in baseload generation units that are currently serving native load and these investments have proven valuable in the long run to the customers and shareholders of these utilities. The decisions of these companies resulted in lower and more stable energy prices and have created opportunity for off-system sales that produce profits and opportunity for reductions in rates. Aquila, on the other hand, is saddled with its decisions to continue to use more gas-fired generation. Building these plants is much less expensive than coal-fired units gas prices. However, the fuel is more expensive, especially with the high and unstable price of gas. With access to a fuel adjustment mechanism pursuant to SB 179, which Aquila undoubtedly anticipates using in the very near future, the unstable fuel costs will be passed along rapidly to the consumer. Aquila's incentives to avoid higher fuel cost generation ownership and build baseload generation will diminish as a result. Aquila's only apparent ratemaking risk will be that it is prudent in the purchase of the fuel, its choice of units dispatched, and its decisions to purchase power from others. In this case the Commission does not give Aquila a cause for concern in the prudence of the choice of types of units it owns. Neither the Stipulation nor the Order conveys a message to Aquila that it will be adversely impacted by its decisions on owned unit fuel mix relying heavily on natural gas or that Aquila's MPS customers will be sheltered from the consequences of those decisions. This Commission should convey both in the determination of rates.

Management Adjustments

The Stipulation further does not address the other decisions made by Aquila's management that have adversely impacted Aquila. Aquila has been struggling to

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recover from those past management decisions that placed heavy emphasis on opportunities and investments outside the regulated business. Those decisions turned out to be disastrous for the Company and have had an adverse impact on the cost of financing projects important to the customers of Aquila. It is not clear in this Stipulation that ratepayers are insulated from the additional cost of debt Aquila must incur in doing business. Such protection should be clear. It also does not appear that any reduction in return was given to the Company as a result of management decisions that have resulted in harm and additional risk to shareholders and ratepayers alike. It is clear that despite the negative impact of these decisions, management has been rewarded with bonuses. Yet this Commission in its Order does not give consequences for the management's performance or for the company's attitude about rewarding management under these circumstances. Merely conveying words of dismay from the Commission has already proven to have no obvious impact.

Class Cost of Service

Finally, this Commissioner wishes to express concern about the consequences of this decision for residential consumers. This decision results in a significant increase in revenues to Aquila with the strong possibility of additional proposals for requests for greater increases as early as July of this year. Residential consumers are not only bearing the impact of this increase, they are also picking up additional costs that are being shifted from the largest industrial customers. The results are as follows:

Aquila Networks—L&P Total % Increase to Permanent Rates Total Increase from Current Bill		
Residential	8.72%	6.26%
Small General Service	6.35%	3.91%
Large General Service	6.35%	2.64%
Large Power Service	2.10%	-0.59%
Lighting & Other	6.35%	4.58%
Aquila Networks—MPS Total % Increase to Permanent Rates Total Increase from Current Bill		
Residential	13.49%	8.82%
Small General Service	11.27%	5.97%
Large General Service	7.85%	1.46%
Large Power Service	6.82%	0.52%
Lighting & Other	11.27%	7.57%

The class cost of service studies can provide justification for shifting costs from such companies, but the Commission is not bound by these studies. The decision to follow them is discretionary with the Commission. Furthermore, class cost of service studies are full of assumptions that may easily be challenged. With the large increases that have occurred in the cost of energy and fuel already burdening consumers, this Commissioner believes that now is not the time to add even more to that burden.

For these reasons I respectfully dissent.

**In the Matter of the Tariff Filing of Aquila, Inc., to Implement a
General Rate Increase for Retail Steam Heat Service Pro-
vided to Customers in its L&P Missouri Service Area.**

*Case No. HR-2005-0450
Decided February 28, 2006*

Steam §20. Aquila, Inc. submitted proposed tariff sheets intended to implement a rate increase for steam service provided to retail customers in its L&P operating division in Missouri. The stipulation and agreement was approved but Aquila, Inc.'s proposed steam heat tariff sheets were rejected.

ORDER REGARDING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement submitted by the parties.

On May 27, 2005, Aquila, Inc., submitted proposed tariff sheets (YH-2005-1066) intended to implement a general rate increase for steam service provided to retail customers in its L&P operating division in Missouri. On June 1, the Commission suspended the Company's proposed tariff sheets until April 24, 2006.

On February 17, 2006, Aquila, Inc., the Staff of the Missouri Public Service Commission, AG Processing, Inc., and the City of St. Joseph filed a nonunanimous stipulation and agreement. That stipulation and agreement resolves all disputes between the parties regarding the proposed steam rate increase. A copy of the stipulation and agreement is attached to this order as Attachment 1.

Not all parties signed the stipulation and agreement. However, Commission Rule 4 CSR 240-2.115(2) provides that if no party objects to a nonunanimous stipulation and agreement within seven days of its filing, the Commission may treat that stipulation and agreement as unanimous. No party has filed a timely objection to the stipulation and agreement and the Commission will treat it as unanimous.

Staff filed suggestions in support of the stipulation and agreement on February 24. On February 27, the Commission held an on-the-record presentation regarding the proposed stipulation and agreement. At that proceeding, the Commission questioned the signatory parties, as well as those parties that did not sign but did not object to the stipulation and agreement.

As a part of the stipulation and agreement, the parties agreed to specific tariff language that Aquila will file to implement the agreed upon rate increase. That tariff has not yet been filed but the stipulation and agreement asks the Commission to authorize Aquila to file such a tariff. The stipulation and agreement also asks the Commission to allow that tariff, after it is filed, to become effective on March 1, 2006.

The parties agree that if the Commission approves the stipulation and agreement without modification or condition, then the prefiled testimony of all witnesses may be included in the record of this proceeding. The Commission will admit such evidence into the record.

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The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.² Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the stipulation and agreement.

Based on the agreement of the parties and the testimony received at the on-the-record presentation, the Commission believes that the parties have reached a just and reasonable settlement in this case.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on February 17, 2006, is approved as a resolution of all issues in this case (See Attachment 1).
2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement.
3. The proposed steam heat service tariff sheets (YH-2005-1066) submitted on May 27, 2005, by Aquila, Inc., are rejected.
4. Aquila, Inc., is authorized to file the tariff sheets agreed to as part of the Stipulation and Agreement. Aquila, Inc., may request that the tariff sheets be allowed to become effective on March 6, 2006.
5. The prefiled testimony of all witnesses is admitted into evidence and is included in the record of this proceeding.
6. This order shall become effective on March 6, 2006.

Davis, Chm., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents, dissenting opinion to follow

Woodruff, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

¹Section 536.060, RSMo Supp. 2005.

²*State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

DISSENTING OPINION OF COMMISSIONER STEVE GAW

This Commissioner must dissent from the Majority Order issued on February 28, 2006, that allowed Aquila's unlawful fuel rider to go into effect prior to the promulgation of fuel adjustment mechanism rules as required by statute. Under §386.266.9, any electrical or gas corporation "may apply for any adjustment mechanism under this section whether or not the commission has promulgated any such rules." However, §386.266.12 explicitly states that "the commission shall have previously promulgated rules to implement the application process for any rate adjustment mechanism under this section **prior to** the commission **issuing an order** for any rate adjustment."

The rules passed by the Commission were transmitted to the Missouri Secretary of State's office on October 23, 2006, and went into effect on January 30, 2007.¹ The Majority Order was not issued after the rule promulgation, and therefore this Order was in direct violation of the decision in *State ex. rel Utility Consumers Council of Missouri, Inc., etc. v. Missouri Public Service Commission*, 585 S.W.2d 41 (Mo. Banc 1979) (UCCM). UCCM specifies that application of fuel adjustment clauses is beyond the statutory authority of the commission to grant. *Id.* at 47.

While explicitly told, the Commission is without statutory authority by case law and without rules yet promulgated as required under the new statutory language, the Majority's order is unlawful and Aquila's fuel rider should have been denied.

Therefore, I respectfully dissent.

¹ See 4 CSR 240-20.090 and 4 CSR 240-3.161 respectively.

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**In the Matter of Spectra Communications Group, LLC d/b/a
CenturyTel's Request for Competitive Classification Pur-
suant to Section 392.245.5, RSMo (2005).**

*Case No. IO-2006-0317
Decided February 28, 2006*

Telecommunications §40. Spectra Communications Group, LLC, d/b/a CenturyTel, filed its application for competitive classification pursuant to Section 392.245.5, RSMo. Spectra requested that the Commission classify as competitive its residential services, other than exchange service, in the Everton and Mt. Vernon exchanges. The Commission concluded that CenturyTel's application for competitive classification of its residential services, other than exchange access services, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges should be granted.

APPEARANCES

Larry W. Dority, Fischer & Dority, P.C., 101 Madison, Suite 400, Jefferson City, Missouri 65101, for Spectra Communications Group, LLC, d/b/a CenturyTel.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, and *David A. Meyer*, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants Spectra Communications Group, LLC, d/b/a CenturyTel's request for competitive classification pursuant to Section 392.245.5, RSMo 2005, for residential services, other than exchange access service, for the Everton and Mt. Vernon exchanges. In addition, the Commission approves the tariff revisions filed to implement these classifications.

Procedural History

On February 1, 2006, Spectra Communications Group, LLC, d/b/a CenturyTel, filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. In its application, Spectra requested that the Commission classify as competitive its residential services, other than exchange access service, in the Everton and Mt. Vernon exchanges. Concurrent with the filing of its application, Spectra filed proposed tariffs to become effective on March 3, 2006, reflecting the requested competitive classifications.

The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than February 7, 2006. No request for intervention was received and no party filed an objection to the application.

Staff filed its recommendation on February 9, 2006. As part of its recommendation, Staff filed affidavits from various wireless carriers and a facilities-based carrier. Those affidavits provided information about customers being served in the relevant exchanges. Staff recommended that Spectra's application be granted.

The Commission held a hearing on February 22, 2006.¹ Staff, Spectra, and Public Counsel were represented at the hearing. The parties were given the opportunity to give closing arguments at the hearing in lieu of briefs. The Commission heard testimony from Staff's witness, Adam McKinnie, and from Spectra's witness, Arthur Martinez.

On February 27, 2006, Spectra filed a letter with additional information as requested by the Commission. That exhibit is marked as Exhibit 3 and admitted into the record.

Overview

Spectra is a large incumbent local exchange carrier (ILEC) that became subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten-days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

On July 14, 2005, Senate Bill No. 237² (S.B. 237) was signed into law and became effective August 28, 2005. S.B. 237 changed the process under the price cap statute³ for determining whether the business and residential services of a price cap regulated ILEC should be classified as competitive in an exchange.

Before S.B. 237, the Commission was required to determine that "effective competition" existed for the requested services in the designated exchanges before classifying those services as competitive. Under this "effective competition" standard, the Commission reviewed, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

¹ The hearing was held simultaneously with the companion case for CenturyTel of Missouri, LLC, Case No. IO-2006-0316.

² S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), codified at Section 392.245, RSMo Cum. Supp. 2005.

³ Section 392.245, RSMo.

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Under S.B. 237, however, the Commission no longer determines whether “effective competition” exists. Rather, S.B. 237 focuses on the number of carriers providing “basic local telecommunications service” within an exchange. The Commission must classify the ILEC’s services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.⁴

The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁵ The other entity that can be counted as providing basic local telecommunications services is one that provides “local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest.”⁶ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services.

Spectra’s application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for residential services in five exchanges.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Spectra is a “local exchange telecommunications company” and a “public utility,” and is authorized to provide “telecommunications service” within the state of Missouri as each of those phrases is defined in Section 386.020. Spectra is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245.

In its application, Spectra requested that the Commission classify the residential services, except for exchange access, in the Everton and Mt. Vernon exchanges as competitive.

In support of this request, Spectra filed its verified application including maps of the service territory of wireless carriers in the relevant exchanges⁷ and the advertisements of MCC Telephony of Missouri, Inc., a/k/a Mediacom.⁸ Spectra also submitted a list of telephone numbers which had been ported from Spectra to

⁴ Section 392.245.5, RSMo.

⁵ Section 392.245.5(1), RSMo.

⁶ Section 392.245.5(2), RSMo.

⁷ Exhibit A.

⁸ Exhibit B.

wireless and wireline companies in the exchanges.⁹ In addition, Spectra filed proposed tariff sheets.¹⁰

Spectra's Director of Governmental Relations, Arthur Martinez, also appeared and testified at the hearing in support of the amended application.

Staff also provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. Adam McKinnie of the Commission's Telecommunications Department testified in support of the application at the hearing. According to Staff's recommendation, all of the exchanges for which Spectra requests competitive status have at least one non-affiliated wireless provider and at least one non-affiliated facilities based wireline carrier providing local voice service to at least two customers with addresses within the exchange.

Attached to Staff's recommendation were the affidavits of Calvin Craib, President of MCC Telephony of Missouri,¹¹ Kenneth A. Schiffman, Director, State Regulatory, Sprint Spectrum, L.P.,¹² Jeffrey D. Sorensen, United States Cellular Corporation,¹³ Vickie Johnson, Senior Tax Manager, and Eric Pue, Senior Contract Manager, on behalf of Cingular Wireless,¹⁴ Michele K. Thomas, Senior Corporate Counsel, on behalf of T-Mobile Central, LLC,¹⁵ and Lawrence J. Krajci, Staff Manager of External Affairs of Alltel Communications, Inc.¹⁶

Staff's witness, Mr. McKinnie, also presented additional information at the hearing about whether wireless and wireline carriers were serving customers in the exchanges.¹⁷ Mr. McKinnie's Exhibit 1 HC compared information gathered by Staff from five different sources which could indicate the presence or lack of the presence of wireless or wireline customers with local telephone numbers within the exchanges.

The first source of data was the affidavits of the wireless carriers which indicated that there were at least two wireless residential customers in each exchange.¹⁸ The second source was Spectra's information showing that it has ported telephone numbers to wireless carriers for at least two residential customers in the Mt. Vernon exchange. The third data source was the Local Exchange Routing Guide (LERG) showing local numbers assigned to wireless carriers in the Mt. Vernon exchange.

The fourth source is Type 1 wireless numbers obtained by the wireless carriers from Spectra. And the final data source is data from the Numbering Resource Utilization/Forecast (NRUF) obtained from the North American Numbering Plan

⁹ Exhibit C.

¹⁰ Exhibit D.

¹¹ Schedule 2 HC.

¹² Schedule 3.

¹³ Schedule 4.

¹⁴ Schedule 5.

¹⁵ Schedule 6.

¹⁶ Schedule 7.

¹⁷ Exhibit 1 HC.

¹⁸ Alltel, Cingular, and T-Mobile each indicated that although they had at least two customers within some of the exchanges, they do not distinguish between residential and business customers.

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Administrator (NANPA), Neustar. The data obtained from the fourth and fifth sources is considered highly confidential so it will not be included specifically in this order.

When comparing all the various sources, the data seemed contradictory for the Everton exchange. According to Spectra's data, no numbers have been ported by it to wireless carriers in the exchange and the LERG data showed no local numbers assigned to the wireless carriers. This information seems contradictory to the affidavits from the wireless carriers. The data for Type 1 wireless numbers and from the NRUF data did not provide certain clarification. Mr. McKinnie testified, however, that he did not know if the NRUF or LERG information was current or when that data had been provided.

One possible way to reconcile the contradiction was explained during Mr. Martinez's testimony. Mr. Martinez explained that it is possible that Spectra could have a provision in its interconnection agreement to provide reverse toll billing for certain telephone numbers. After inquiring further, CenturyTel filed a letter on February 26, 2006, which indicated that it did not have any reverse billing arrangements in place in the Everton exchange.

The Commission finds that the facts as submitted in the verified application, the verified Staff Recommendation, including the affidavits of competing carriers and the hearing testimony are reliable and support the grant of competitive classification in the requested exchanges. Even though some information gathered by Staff seemed contradictory to the affidavits of the competing companies, the Commission finds that the affidavits are more reliable evidence because the Commission knows that the information is current. Based on that information, the Commission finds that Mediacom is providing facilities-based local voice service to residential customers in the Everton and Mt. Vernon exchanges. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services (CMRS) carrier providing service to residential customers in the Everton and Mt. Vernon exchanges.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo, as amended in 2005 by S.B. 237, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Spectra is an incumbent local exchange telecommunications company and has requested competitive classification of its business or residential services in several exchanges.

Section 392.245.5, RSMo, as amended in 2005 by SB 237, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."¹⁹ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.²⁰

S.B. 237 defines "local voice service" as meaning "[r]egardless of the technology used . . . two way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo."²¹

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."²²

Spectra is asserting that its services in various exchanges should be classified as competitive. As the party asserting the positive of a proposition, Spectra has the burden of proving that proposition.²³

¹⁹ Section 392.245.5(1).

²⁰ Section 392.245.5(2).

²¹ Section 392.245.5(3).

²² Section 386.020(52).

²³ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

DECISION

The undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated entity providing "local voice" service, in whole or in part, over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that Spectra's application for competitive classification of its residential services, other than exchange access services, in the Everton and Mt. Vernon exchanges should be granted.

As required by the statute, Spectra submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of March 3, 2006. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

IT IS ORDERED THAT:

1. Spectra Communications Group, LLC, d/b/a CenturyTel's residential services, other than exchange access service, are classified as competitive in the Everton and Mt. Vernon exchanges.
2. Spectra Communications Group, LLC, d/b/a CenturyTel's proposed tariff revisions (Tracking Nos. JI-2006-0604, JI-2006-0605, JI-2006-0606, JI-2006-0607, JI-2006-0608, and JI-2006-0609) filed on February 1, 2006, are approved to become effective for service on or after March 3, 2006.
3. All other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.
4. This Report and Order shall become effective March 3, 2006.

Davis, Chm., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., dissent in part, with separate
opinions to follow;
all certify compliance with the provisions of
Section 536.080, RSMo 2000.

OPINION OF COMMISSIONERS ROBERT M. CLAYTON III AND STEVE GAW, DISSENTING, IN PART, AND CONCURRING, IN PART

These Commissioners dissent from the majority's Report and Order regarding competitive status for residential service in one of the applicant's exchanges, Everton, pursuant to §392.245, RSMo., 2005. The majority concluded that the statute was satisfied for both of the exchanges, Everton and Mt. Vernon, included in Spectra's application for competitive classification. The parties submitted evidence at hearing to establish that MCC Telephony of Missouri a/k/a Mediacom provides residential phone service to more than one customer in each exchange using facilities it owns in whole or in part. In addition, evidence was presented

attempting to establish that a wireless provider had, not only coverage in the areas involved, but also offered local telephone numbers and local service. These Commissioners have concerns with the availability of competition in the Everton exchange due to the absence of evidence of local calling to wireless providers in that exchange. The remaining provisions regarding the Mt. Vernon exchange in the Report and Order warrant support.

Contradictory evidence was presented in the Everton exchange regarding the ability of wireline customers in the exchange to dial Cingular wireless customers. Cingular was submitted as the wireless carrier meeting the statutory requirements of §392.245, RSMo., 2005. As previously stated by these Commissioners in other cases it is an important requirement under the 30-day competitive classification test that the wireless carrier submitted be accessible by the local wireline carrier toll-free.

An affidavit submitted by Cingular did indicate that such toll-free dialing could be accomplished. However, highly confidential material submitted into the record by Staff contradicted this affidavit. No adequate explanation has been given for this discrepancy.

The only alternative for a wireless customer to be called "locally" or toll-free from an Everton wireline phone would require customers to obtain a local number by signing up for local service from Spectra or Mediacom and then transferring the number to a wireless provider to procure phone service with local, toll-free service using the option of Local Number Portability. It is unlikely the average consumer would understand the telecommunications industry well enough to execute this strategy. And as a result, the average consumer would not have a choice in local service demonstrating that competition may not exist in Everton.

In addition, there was no evidence presented to show the existence of an Extended Area Service (EAS) route or other means of offering unlimited toll-free in-bound and out-bound calling in a local service area. In four prior Opinions¹, one of these Commissioners has emphasized the letter and the spirit of SB 237 in establishing the existence of basic local service offered by a wireless provider. Both Commissioners Clayton and Gaw have consistently argued in previous cases that a wireless provider must have local phone numbers, or its equivalent, and local service available in an exchange for that provider to be considered as "local" in the competitive analysis.

These Commissioners are also concerned that some of the customers in both the Everton and Mt. Vernon exchanges may not have access to Mediacom service. While the statute does not specifically require that the service be available to everyone in an exchange, these Commissioners believe that requirement is part of the spirit of the statute. As a result, some customers will have a choice in local phone service, while others will not and will be without the protections of a truly competitive marketplace.

These Commissioners believe that the residents of the Everton exchange may be vulnerable to significant price increases without sufficient price discipline from

¹ See, *In Re Sprint*, Case No. IO-2006-0092, Opinion of Commissioner Clayton; *In Re SBC*, Case No. TO-2006-0093, Opinion of Commissioner Clayton; *In Re CenturyTel*, Case No. IO-2006-0109, Opinion of Commissioner Clayton; *In Re Centurytel*, Case No. IO-2006-0316, Opinion of Commissioner Clayton.

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a robust competitive market and without any price oversight from the Commission. The Commission must be vigilant in its review of these 30-day competitive classification cases and ensure that the telecommunications company unequivocally satisfies all of the statutory requirements. This is particularly important in deciding whether it is appropriate in situations, like the present case, where the market share of the wireless providers competing with the incumbent is small. The evidence presented in this case did not meet requirements of the law for the Everton exchange to be declared competitive.

For the foregoing reasons, these Commissioners respectfully dissent.

**In the Matter of CenturyTel of Missouri, LLC's Request for
Competitive Classification Pursuant to Case No. IO-2006-
0316 Section 392.245.5, RSMo (2005).**

*Case No. IO-2006-0316
Decided February 28, 2006*

Telecommunications §40. The Commission approved CenturyTel of Missouri, LLC's application requesting the Commission classify as competitive its residential services other than exchange access service, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges.

Appearances

Larry W. Dority, Fischer & Dority, P.C., 101 Madison, Suite 400, Jefferson City, Missouri 65101, for CenturyTel of Missouri, LLC.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, and *David A. Meyer*, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants CenturyTel of Missouri, LLC's request for competitive classification pursuant to Section 392.245.5, RSMo 2005, for residential services, other than exchange access service, for the Ava, Columbia, Crane, Marshfield, and Seymour exchanges. In addition, the Commission approves the tariff revisions filed to implement these classifications.

Procedural History

On February 1, 2006, CenturyTel of Missouri, LLC, filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. In its application, CenturyTel requested that the Commission classify as competitive its residential services, other than exchange access service, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges. Concurrent with the filing of its application, CenturyTel filed proposed tariffs to become effective on March 3, 2006, reflecting the requested competitive classifications.

The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than February 7, 2006. No request for intervention was received and no party filed an objection to the application.

Staff filed its recommendation on February 9, 2006. As part of its recommendation, Staff filed affidavits from various wireless carriers and a facilities-based carrier. Those affidavits provided information about customers being served in the relevant exchanges. Staff recommended that CenturyTel's application be granted.

The Commission held a hearing on February 22, 2006.¹ Staff, CenturyTel, and Public Counsel were represented at the hearing. The parties were given the opportunity to give closing arguments at the hearing in lieu of briefs. The Commission heard testimony from Staff's witness, Adam McKinnie, and from CenturyTel's witness, Arthur Martinez.

On February 27, 2006, CenturyTel filed a letter with additional information as requested by the Commission.

Overview

CenturyTel is a large incumbent local exchange carrier (ILEC) that became subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten-days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

On July 14, 2005, Senate Bill No. 237² (S.B. 237) was signed into law and became effective August 28, 2005. S.B. 237 changed the process under the price cap statute³ for determining whether the business and residential services of a price cap regulated ILEC should be classified as competitive in an exchange.

¹ The hearing was held simultaneously with the companion case for Spectra Communications Group, LLC, d/b/a CenturyTel, Case No. IO-2006-0317.

² S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), codified at Section 392.245, RSMo Cum. Supp. 2005.

³ Section 392.245, RSMo.

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Before S.B. 237, the Commission was required to determine that "effective competition" existed for the requested services in the designated exchanges before classifying those services as competitive. Under this "effective competition" standard, the Commission reviewed, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

Under S.B. 237, however, the Commission no longer determines whether "effective competition" exists. Rather, S.B. 237 focuses on the number of carriers providing "basic local telecommunications service" within an exchange. The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.⁴

The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁵ The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."⁶ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services.

CenturyTel's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for residential services in five exchanges.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

CenturyTel is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020. CenturyTel is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245.

CenturyTel requested that the Commission classify the residential services, except for exchange access, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges as competitive. In support of this request, CenturyTel filed its verified application including maps of the service territory of wireless carriers in the relevant

⁴ Section 392.245.5, RSMo.

⁵ Section 392.245.5(1), RSMo.

⁶ Section 392.245.5(2), RSMo.

exchanges⁷ and the advertisements of MCC Telephony of Missouri, Inc., a/k/a Mediacom.⁸ CenturyTel also submitted a list of telephone numbers which had been ported from CenturyTel to wireless and wireline companies in the exchanges.⁹ In addition, CenturyTel filed proposed tariff sheets.¹⁰

CenturyTel's Director of Governmental Relations, Arthur Martinez, also appeared and testified at the hearing in support of the amended application.

Staff provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. Adam McKinnie of the Commission's Telecommunications Department testified in support of the application at the hearing. According to Staff's recommendation, all of the exchanges for which CenturyTel requests competitive status have at least one non-affiliated wireless provider and at least one non-affiliated facilities based wireline carrier providing local voice service to at least two customers with addresses within the exchange.

Attached to Staff's recommendation were the affidavits of Calvin Craib, President of MCC Telephony of Missouri,¹¹ Kenneth A. Schiffman, Director, State Regulatory, Sprint Spectrum, L.P.,¹² Jeffrey D. Sorensen, United States Cellular Corporation,¹³ Vickie Johnson, Senior Tax Manager, and Eric Pue, Senior Contract Manager, on behalf of Cingular Wireless,¹⁴ Michele K. Thomas, Senior Corporate Counsel, on behalf of T-Mobile Central, LLC,¹⁵ and Lawrence J. Krajci, Staff Manager of External Affairs of Alltel Communications, Inc.¹⁶

Staff's witness, Mr. McKinnie, also presented additional information at the hearing about whether wireless and wireline carriers were serving customers in the exchanges.¹⁷ Mr. McKinnie's Exhibit 1 HC compared information gathered by Staff from five different sources which could indicate the presence of or lack of wireless or wireline customers with local telephone numbers within the exchanges.

The first source of data was the affidavits of the wireless carriers which indicated that there were at least two wireless residential customers in each exchange.¹⁸ The second source was CenturyTel's information showing that it has ported telephone numbers to wireless carriers for at least two residential customers in the Ava,

⁷ Exhibit A.

⁸ Exhibit B.

⁹ Exhibit C.

¹⁰ Exhibit D.

¹¹ Schedule 2 HC.

¹² Schedule 3.

¹³ Schedule 4.

¹⁴ Schedule 5.

¹⁵ Schedule 6.

¹⁶ Schedule 7.

¹⁷ Exhibit 1 HC.

¹⁸ Alltel, Cingular, and T-Mobile each indicated that although they had at least two customers within some of the exchanges, they do not distinguish between residential and business customers.

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Columbia, and Marshfield exchanges. The third data source was the Local Exchange Routing Guide (LERG) showing local numbers assigned to wireless carriers in the Ava, Columbia, and Marshfield exchanges.

The fourth source was Type 1 wireless numbers obtained by the wireless carriers from CenturyTel. And the final data source was data from the Numbering Resource Utilization/Forecast (NRUF) obtained from the North American Numbering Plan Administrator (NANPA), Neustar. The data obtained from the fourth and fifth sources is considered highly confidential so it will not be included specifically in this order.

When comparing all the various sources, the data seemed contradictory for the Crane and Seymour exchanges. According to CenturyTel's data, no numbers have been ported by it to wireless carriers in the exchange and the LERG data showed no local numbers assigned to the wireless carriers. This information seems contradictory to the affidavits from the wireless carriers. The data for Type 1 wireless numbers and from the NRUF did not provide clarification. Mr. McKinnie testified, however, that he did not know if the NRUF or LERG information was current or when that data had been provided.

One way to reconcile the contradiction was explained during Mr. Martinez's testimony. Mr. Martinez explained that it is possible that CenturyTel could have a provision in its interconnection agreement with the other carriers to provide reverse toll billing for certain telephone numbers. After making further inquiry, CenturyTel filed a letter on February 27, 2006, which indicated that it did not have any reverse billing arrangements in place in the Crane or Seymour exchanges.

The Commission finds that the facts as submitted in the verified application, the verified Staff Recommendation, including the affidavits of competing carriers and the hearing testimony are reliable and support the grant of competitive classification in the requested exchanges. Even though some information gathered by Staff seemed contradictory to the affidavits of the competing companies, the Commission finds that the affidavits are more reliable evidence because the Commission knows that the information is current. Based on that information, the Commission finds that Mediacom is providing facilities-based local voice service to residential customers in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services (CMRS) carrier providing service to residential customers in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo, as amended in 2005 by S.B. 237, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the

requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

CenturyTel is an incumbent local exchange telecommunications company and has requested competitive classification of its business or residential services in several exchanges.

Section 392.245.5, RSMo, as amended in 2005 by SB 237, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."¹⁹ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.²⁰

S.B. 237 defines "local voice service" as meaning "[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo."²¹

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."²²

¹⁹ Section 392.245.5(1).

²⁰ Section 392.245.5(2).

²¹ Section 392.245.5(3).

²² Section 386.020(52).

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CenturyTel is asserting that its services in various exchanges should be classified as competitive. As the party asserting the positive of a proposition, CenturyTel has the burden of proving that proposition.²³

DECISION

The undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated entity providing "local voice" service, in whole or in part, over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that CenturyTel's application for competitive classification of its residential services, other than exchange access services, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges should be granted.

As required by the statute, CenturyTel submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of March 3, 2006. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

IT IS ORDERED THAT:

1. CenturyTel of Missouri, LLC's residential services, other than exchange access service, are classified as competitive in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges.
2. CenturyTel of Missouri, LLC's proposed tariff revisions (Tracking Nos. JI-2006-0598, JI-2006-0599, JI-2006-0600, JI-2006-0601, JI-2006-0602, JI-2006-0603) filed on February 1, 2006, are approved to become effective for service on or after March 3, 2006.
3. All other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.
4. This Report and Order shall become effective March 3, 2006.

Davis, Chm., Murray, and Appling, CC., concur;
Clayton, C., concurs in part, with concurrence to follow;
Gaw, C., dissents in part, with dissent to follow;
all certify compliance with the provisions
of Section 536.080, RSMo 2000.

OPINION OF COMMISSIONER ROBERT M. CLAYTON III CONCURRING, IN PART, AND DISSENTING, IN PART

This Commissioner concurs with the majority's Report and Order regarding competitive status for residential service in certain of the applicant's exchanges pursuant to §392.245, RSMo. 2005. With the exception of the Crane and Seymour exchanges, this Commissioner agrees that the statute was satisfied for the

²³ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

exchanges included in Centurytel's application for competitive classification. The parties submitted evidence at hearing which established that MCC Telephony of Missouri a/k/a Mediacom provides residential phone service to more than one customer in each exchange using facilities it owns in whole or in part. In addition, the evidence clearly established that a wireless provider offered, not only coverage in the areas involved, but also local telephone numbers and local service in Ava, Columbia and Marshfield. While this Commissioner has concerns with the availability of competition in Crane and Seymour due to the absence of local calling to wireless providers in those exchanges, the remaining provisions of the Report and Order warrant support.

Regarding Crane and Seymour, Staff testified that there is an agreement between Centurytel and U.S. Cellular that permits local dialing from a Centurytel wireline phone to a wireless U.S. Cellular phone in those exchanges. Local dialing is permitted even if the N-X-X of the wireless phone is from another exchange. Had this fact been firmly established, this Commissioner may have been satisfied. However, there was some confusion as to the existence of the agreement as well as concern that Mediacom customers lacked the ability to make and receive toll-free, local calls with wireless phones in the Crane and Seymour exchanges. The only alternative for a wireless customer to be called "locally" or toll free from a Crane or Seymour wireline phone would require consumers to obtain a local number by signing up for local service from Centurytel or Mediacom and then transferring the number to a wireless provider to procure phone service with local, toll-free service using the option of Local Number Portability. It is unlikely the average consumer would understand the telecommunications industry well enough to execute this strategy. And as a result, the average consumer would not have a choice in local service demonstrating that competition may not exist in Crane and Seymour.

In addition, there was no evidence presented to show the existence of an Extended Area Service (EAS) route or other means of offering unlimited toll-free inbound and out-bound calling in a local service area. In three prior Opinions¹, this Commissioner has emphasized the letter and the spirit of SB 237 in establishing the existence of basic local service offered by a wireless provider. This Commissioner has consistently argued that a wireless provider must have local phone numbers, or its equivalent, and local service available in an exchange for that provider to be considered as "local" in the competitive analysis.

This Commissioner is also concerned that some of the customers in the five exchanges may not have access to Mediacom service. While the statute does not specifically require that the service be available to everyone in an exchange, this Commissioner believes that requirement is part of the spirit of the statute. As a result, some customers will have a choice in local phone service, while others will not and will be without the protections of a truly competitive marketplace.

This Commissioner believes that the residents of the Crane and Seymour exchanges may be vulnerable to significant price increases without any price discipline from a competitive market, and additionally, without the protections of the

¹ See, *In Re Sprint*, Case No. IO-2006-0092, Opinion of Commissioner Clayton; *In Re SBC*, Case No. TO-2006-0093, Opinion of Commissioner Clayton; *In Re CenturyTel*, Case No. IO-2006-0109, Opinion of Commissioner Clayton.

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Commission, which formerly stood in the place of competition. For the above reasons, this Commissioner would have denied the applicant's request for competitive classification for residential services in the Crane and Seymour exchanges.

For all other portions of the majority Report and Order, this Commissioner concurs.

**OPINION OF COMMISSIONER STEVE GAW,
DISSENTING, IN PART, AND CONCURRING, IN PART**

This Commissioner respectfully dissents in part and concurs in part, generally for the reasons set forth in the Opinion of Commission Clayton. Additionally in my opinion, the language in the Order does not properly set forth all of the necessary requirements. It is important that a wireless carrier being considered as operating within an exchange in which competitive classification is being sought, have a phone number available which can be reached from that exchange by a wireline phone without paying a toll charge. The statutory hurdle which must be cleared for a company to gain competitive classification is already too low without it being further lowered by the Commission.

Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing Applicant (if and to the Extent the Transaction Described Herein Would Constitute the Issuance of an Evidence of Indebtedness by Applicant under Sections 393.180 and 393.200, RSMo) to Execute, Deliver and Perform the Agreements and Instruments Necessary to Assume a Lease and Related Documents Pertaining to the NRG Audrain Combustion Turbine Generator Facility Owned by Audrain County, Missouri, Which Was Constructed as Part of a Revenue Bond Project under Chapter 100, RSMo.

*Case No. EF-2006-0278
Decided February 28, 2006*

Electric §4. This order allowed AmerenUE to assume a leasehold interest in Audrain County's NRG Audrain Facility. The Commission authorized AmerenUE to execute, deliver and perform the agreements and instruments necessary to the lease pertaining to the NRG Audrain combustion turbine generator facility owned by Audrain County, Missouri.

ORDER GRANTING APPLICATION

This order grants the application filed by Union Electric Company, d/b/a AmerenUE, and allows AmerenUE to assume a leasehold interest in Audrain County's NRG Audrain Facility.

The Application

On December 27, 2005, Union Electric Company, d/b/a AmerenUE, asked for permission to assume a lease that NRG Audrain Generating LLC holds in Audrain County's NRG Audrain Facility. AmerenUE has entered into an Asset Purchase and Sale Agreement with Audrain Holding, LLC and NRG Audrain Generating LLC. That contract would allow AmerenUE to acquire the rights and obligations that NRG Generating currently holds in the NRG Audrain Facility under a lease with Audrain County, Missouri.

The NRG Audrain Facility consists of eight GE 7001EA natural-gas-fired combustion turbine generating units with a combined nameplate capacity of 640 megawatts, along with approximately 100 acres of land, equipment, and other improvements. Audrain County owns the facility, and leased it to NRG Generating as part of a Chapter 100 financing arrangement, which allows NRG Generating, or any other lessee, to operate that facility without being responsible for *ad valorem* property taxes.¹

¹ According to Staff, the lessee of the NRG Audrain Facility makes lease payments to Audrain County, and Audrain County makes matching bond payments to the bondholder, which is the lessee. Thus, the payments offset each other, and no cash outflow occurs.

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According to AmerenUE, assuming the lease might be evidence of indebtedness, and therefore, AmerenUE must have Commission authority under Sections 393.180 and 393.200 before closing the transaction. AmerenUE states that it needs the additional capacity that the NRG Audrain Facility would supply to meet a prudent level of reserves for the summer of 2006.

Staff Recommendation

The Staff of the Commission filed its Recommendation on February 17. Staff stated it has not encountered a transaction such as this before, and that because Section 393.200 does not state a standard that the Commission should use, the Commission should use the least onerous standard, which is “not detrimental to the public interest.”

Staff states that the proposed transaction would not be detrimental to the public interest. In fact, Staff states that the transaction would be in the public interest because of the approximately \$2 million in annual property tax savings that AmerenUE would realize, which could be passed on to AmerenUE customers in the form of lower rates. Staff further differentiated this case from two other recent Chapter 100 cases.

In Case No. EO-2003-0035, AmerenUE asked the Commission for authority to enter into a Chapter 100 financing arrangement with the City of Bowling Green. In that case, Section 393.190 applied, because AmerenUE owned the generating facility and wanted to sell it to Bowling Green. In the instant case, AmerenUE does not own the NRG Audrain Facility, and therefore cannot dispose of any of its franchise, works, or system with the proposed transaction.

Also, Staff mentioned Case No. EO-2005-0156, in which Aquila, Inc., sought permission to enter into a Chapter 100 financing arrangement with the City of Peculiar. Staff is satisfied that none of the issues surrounding Aquila's South Harper case are present in this case because of AmerenUE's answers to data requests, as well as the fact that the NRG Audrain Facility has operated without controversy since 2001.

Because Staff believes the proposed transaction would not be detrimental to the public interest, Staff recommends that the Commission grant the application subject to certain conditions. In its application, AmerenUE consented to the first five of these conditions. Because Staff proposed additional conditions, the Commission ordered AmerenUE to respond to Staff's Recommendation. AmerenUE responded on February 22 and stated that it accepted Staff's additional conditions.

The Commission has reviewed the parties' verified pleadings. The Commission finds that the transaction AmerenUE proposes would not be detrimental to the public interest, and will therefore approve the transaction, subject to the above conditions.

IT IS ORDERED THAT:

1. The application filed by Union Electric Company, d/b/a AmerenUE, is granted, subject to the following conditions:

- A. Union Electric Company, d/b/a AmerenUE, shall continue to record the land and improvements (combustion turbines) that are the subject of this transaction as a regulatory asset on its books similar to other utility property that it owns;
- B. Union Electric Company, d/b/a AmerenUE, shall record the investment described above in accordance with the Uniform System of Accounts as adopted by this Commission for record-keeping purposes;
- C. Union Electric Company, d/b/a AmerenUE, shall depreciate the combustion turbines at the annual rate of 4%, which reflects a twenty-five year useful life. This is AmerenUE's present rate for Account No. 344 Other Production Plant – Generators;
- D. Union Electric Company, d/b/a AmerenUE, shall book each annual grant payment to operating expense during the remaining term of the Grant Agreement, as each annual grant payment is made;
- E. No ratemaking determination is being made by the Commission in this proceeding and no party to this case has acquiesced to any present or future ratemaking treatment as it relates to this transaction. The ratemaking treatment of this transaction may be addressed in Union Electric Company, d/b/a AmerenUE's next rate case or the Staff's next earnings complaint case, but no ratemaking treatment is being sought by Union Electric Company, d/b/a AmerenUE, in this proceeding;
- F. Union Electric Company, d/b/a AmerenUE, shall seek and obtain Commission approval before it transfers any of the rights it holds pursuant to the lease where such rights are necessary or useful in the provision of regulated utility service, including the right to purchase the facility at the end of the lease;
- G. Union Electric Company, d/b/a AmerenUE, shall not sell its rights to the Bond Purchase Agreement acquired through its acquisition of the Audrain Facility without Commission approval.
2. The Commission authorizes Union Electric Company, d/b/a AmerenUE, to execute, deliver and perform the agreements and instruments necessary to assume a lease pertaining to the NRG Audrain combustion turbine generator facility owned by Audrain County, Missouri, which was constructed as part of a revenue bond project under Chapter 100, RSMo.
3. This order shall become effective on March 10, 2006.
4. This case may be closed on March 11, 2006.

Davis, Chm., concurs, with separate
concurring opinion attached.
Murray, Gaw, Clayton, and Appling, CC.,
concur.

Pridgin, Regulatory Law Judge

Concurring Opinion of Commissioner Jeff Davis

This commissioner concurs with the Order Granting AmerenUE's Application to assume the lease of NRG's Audrain Facility, as it is in the best interest of AmerenUE's ratepayers. However, this commissioner would like to comment on the application to intervene filed by the Missouri Joint Municipal Electric Utility Commission's (MJMEUC) that was denied by a majority of this commission.

This commissioner concurred with the decision to deny MJMEUC's Application for Intervention. MJMEUC obviously has transmission-related grievances with AmerenUE. This causes MJMEUC to intervene in cases where AmerenUE is a principal party and seek to extract concessions from AmerenUE. The exact nature of these problems is difficult to discern from the pleadings filed by MJMEUC in this case, as well as their application to intervene in AmerenUE's application to serve Noranda Aluminum Smelting in front of FERC.¹

As a matter of personal preference, this commissioner would prefer having the opportunity to address all of MJMEUC's concerns. This could be done in a case wholly dedicated to any perceived inadequacies or alleged improprieties with regard to the transmission system, or its operation, whereby this commission would have the opportunity to decide such issues on their own merits. Other parties including, but not limited to, AmerenUE and the Midwest Independent Systems Operators (MISO), would have the chance to respond to MJMEUC's allegations and present their own evidence. Such a case could hopefully resolve the differences between these parties.

¹FERC Case No. ER05-485

**In the Matter of the Petition for Arbitration of Unresolved Issues
in a Section 251(b)(5)) consolidated with Agreement with T-
Mobile USA, Inc.***

Case No. TO-2006-0147

Decided March 3, 2006

Telecommunications §46.1. The Commission resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. It also combined with TO-2006-0151 which resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. These issues include the method of interconnection, appropriate forward-looking cost methodology, and intercarrier compensation.

APPEARANCES

W.R. England, Brian T. McCartney and Melissa Manda, Brydon, Swearngen & England, PC, 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102. Attorneys for Petitioners.

Mark Johnson, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111. Attorney for T-Mobile USA, Inc.

Paul Walters, Jr., The Walters Law Firm, 15 East 1st Street, Edmond, Oklahoma 73034. Attorney for Cingular Wireless.

Arbitrator: Kennard L. Jones, Administrative Law Judge

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Walter Cecil, Regulatory Economist II, Utility Operations Division, Missouri Public Service Commission.

Bill Voight, Rate and Tariff Examiner Supervisor, Missouri Public Service Commission.

Marc Poston, Senior Counsel, General Counsel Division, Missouri Public Service Commission.

* See pages 214 and 285 for other orders in this case.

FINAL ARBITRATION REPORT

PROCEDURAL HISTORY

On October 4, 2005, a number of small rural telephone carriers¹ filed petitions for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, United States Code ("the Act"), and Commission rule 4 CSR 240-36.040. The Petitioners in Case No. TO-2006-0147 ask the Commission to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. The Petitioners in Case No. TO-2006-0151 ask the Commission to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. Because the petitions contained common questions of law and fact and many of the same Petitioners, the Arbitrator consolidated these cases, making Case No. TO-2006-0147 the lead case.

Dismissal of CLECs

On December 20, 2005, the Commission dismissed four CLEC petitioners from this arbitration: Fidelity Communications Services I, Inc.; Fidelity Communications Services II, Inc.; Green Hills Telecommunications Services; and Mark Twain Communications Company.

Motion for Summary Judgment

During the course of the proceedings, T-Mobile filed a motion for summary determination of one of the contested issues; whether Petitioners have an "obligation to pay reciprocal compensation on landline (intraMTA) traffic terminated to [T-Mobile] by third-party carriers (such as IXCs) when that traffic is neither

¹ The carriers filing under Case No. **TO-2006-0147** are BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, and Steelville Telephone Exchange, Inc.

The carriers filing under Case No. **TO-2006-0151** are BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, *Goodman Telephone Company*, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Green Hills Telecommunications Services, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, Mark Twain Communications Company, *McDonald County Telephone Company*, *Miller Telephone Company*, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, *Ozark Telephone Company*, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, *Seneca Telephone Company* and Steelville Telephone Exchange, Inc.

originated by, nor the responsibility of Petitioners." T-Mobile pointed out that the Commission, on October 6, 2005, in Case No. IO-2005-0468, rejected Petitioners' position on this issue. Petitioners opposed the motion, stating that there were genuine issues of material fact and that discovery was being conducted with regard to facts that were relevant to this issue.

Commission rule 4 CSR 240-2.117 requires that before a Motion for Summary Judgment may be granted, the pleadings must show there is no genuine issue of material fact. Because all of the pleadings did not show there were no genuine issues of material fact, the Arbitrator denied this motion, reserving consideration of this issue for this report.

Motion to Dismiss Issues having to do with Compensation for Past Traffic

T-Mobile and Cingular filed motions to dismiss issues presented by Petitioners having to do with the delivery of past traffic and the related compensation. The Arbitrator initially granted the motions; however, upon reconsideration, set the ruling aside recognizing the state Commission's federally mandated obligation to consider all issues presented.²

Commission rule 4 CSR 240-36.040(19)

This rule states that "[u]nless the results would be clearly unreasonable or contrary to public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue." The Arbitrator finds that several issues cannot be resolved in favor of one party or the other because the results are clearly unreasonable.

The Arbitrator will, therefore, adopt a reasonable position on such issues.

STATEMENT OF FINDINGS AND CONCLUSIONS

Issue No. 1 – Must each Petitioner establish its own separate transport and termination rate based upon its own separate costs?

Petitioners - Each Petitioner has performed a cost study using the HAI Forward-looking costs model and developed a proposed rate based on its forward-looking costs. These costs average \$0.0871 for T-Mobile and \$0.0843 for Cingular. However, Petitioners have agreed to a lower rate of \$0.035 with other wireless carriers in Missouri. Therefore, Petitioners have proposed the use of this \$0.035 rate in this arbitration. FCC rules do not prohibit a uniform rate for all Petitioners where, as here, it is no greater than their forwardlooking costs.

T-Mobile/Cingular – Each Petitioner must establish its own transport and termination rate based upon specific forward-looking economic costs. The Act and FCC Rules do not allow a blanket rate to apply to all Petitioners.

Arbitrator's Decision: Each Petitioner need not establish separate transport and termination rates. However, each Petitioner must establish separate costs.³

Issue No. 2 – What is the appropriate transport and termination rate for each Petitioner?

The appropriate rate for each Petitioner will be the rate that results from the second re-run cost studies to be ordered in this matter. Petitioners can not force

² 47 U.S.C Section 252(b)(4)(C).

³ 47 C.F.R. §51.505(e).

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Respondents to pay any single or uniform rate that is higher than the cost for the individual Petitioner, but the parties may agree to any uniform rate applicable to all Petitioners.

Issue No. 3 – What are Petitioners' forward-looking costs to purchase and install new switches?

Petitioners – Although the default input for this value is \$416.11 per line, Petitioners recommend that the value be increased to \$520.14 per line, based on review of this factor in the past and the resulting investment compared to actual investments. Petitioners further argue that even at this level, the HAI results for small Missouri Companies are about 28% less than current actual investment.⁴

T-Mobile/Cingular – Petitioners have used an inflated value for this cost by first increasing by 25% the HAI default value, which is based on switch costs from 1995. It is generally recognized that switch prices have declined since 1995. Additionally, the \$520.14 per line, suggested by Petitioners, was based on embedded investment in switches, while publicly available information shows significantly lower costs. Respondents suggest \$76.56 per line plus adjustments to fill factors and removal of power plant investments.⁵

Arbitrator's Decision: The Arbitrator adopts the T-Mobile/Cingular position. The Arbitrator notes that Schoonmaker properly re-ran the cost studies for the switch investment in accordance with the Preliminary Arbitration Report, in that he included the fixed switch investments of \$428,296 for hosts and \$161,800 for remotes. Although Respondents further argue that this switch investment is too high for those that serve fewer than 700 lines, there is not sufficient evidence in the record, and Schoonmaker's re-run costs, relating to switch investment, are within the bounds of reasonableness.

Issue No. 4 – What is the appropriate value for the usage-sensitive portion of Petitioners forward-looking end office switching cost?

Petitioners – The HAI Model's input value assigns 70% of switch costs to usage sensitive costs. This is consistent with the FCC's Tenth Report and Order in CC Docket 96-45 and the FCC's "MAG Order."⁶

T-Mobile/Cingular – Because of changes in technology and vendor pricing for switches, usage-sensitive costs for switches have fallen dramatically. The current version of HAI uses a 0% end office, non-port fraction. No additional costs resulting from the use of switches are appropriate except interoffice trunk equipment, which is affected by traffic among offices. No more than \$18.33 per line should be used as a flat, monthly rate.⁷

Arbitrator's Decision: The Arbitrator adopts T-Mobile/Cingular's position. To avoid each LEC having to run costs studies, the "MAG Order" allows, but does not require, an input value of 70% to be assigned to usage sensitive costs of switches. Because a 70% usage-sensitive assigned by the HAI model is not required, nothing precludes a 0% switching cost. The Arbitrator agrees with the position put forth by T-Mobile and Cingular, that switching costs are no longer traffic sensitive.

⁴ Schoonmaker Direct, pg. 24, lines 11-15.

⁵ Conwell Direct, pg. 31, lines 3-14 – pgs. 46 - 49.

⁶ Schoonmaker Rebuttal pgs. 17 – 18.

⁷ Conwell Direct, pg. 47.

Issue No. 5 – What is the appropriate floor space attributable to switching?

Petitioners – The HAI Model's input for floor space should be adopted because it reflects an appropriate amount of building and land investment.⁸

T-Mobile/Cingular – Absent a determination of the floor space required for stand-alone/host switches and remote switches with current technologies, floor space should be derived from the response to data request for Cass County Telephone, which is 200 sq. ft for stand-alone/host switches (four bays) and 100 sq. ft for remotes (two bays).⁹

Arbitrator's Decision: The Arbitrator adopts T-Mobile/Cingular's position. When compared to Petitioners' response to data requests, Petitioners' position of 500 square feet for switches with up to 100 lines and 1000 square feet for switches with up to 5000 lines, is clearly unreasonable. Furthermore, the wireless carriers used the space provided by Southwestern Bell in Missouri for a single bay of equipment in its Caged Collocation tariff as the basis of its calculation.¹⁰ Moreover, the FCC requires that space increments for collocation be in single bays, which included space for the equipment rack, access to the back of the rack and saving room for rack doors in front.¹¹

Issue No. 6 – What is the appropriate Minutes of Use (MOU) forward-looking and office switching cost for all Petitioners?

Petitioners – \$.0092 for T-Mobile Petitioners and \$.0010 for Cingular Petitioners.

T-Mobile/Cingular – \$.0012 per minute.

Arbitrator's Decision: The numbers proposed by each party are average numbers. The actual numbers are the re-run, end-office switching element of costs filed by Schoonmaker.

Issue No. 7 – What are Petitioners' appropriate, forward-looking interoffice cable lengths?

Petitioners – Interoffice cable lengths are based on HAI forward-looking model assumptions that assume, in a forward-looking network, that the RBOC would not build facilities to Petitioners' exchanges, as had been the case historically.¹²

T-Mobile/Cingular – Petitioners' switches should be assumed to remain in current locations and the existing interoffice cable distances among these switches should be used to compute transport costs. The distance between Petitioners' switches and the meet points should reflect actual distance.¹³

Arbitrator's Decision: The Arbitrator adopts the T-Mobile/Cingular position. For interoffice cable lengths the parties shall adopt the current meet point arrangements, subject to renegotiation if those arrangements change, because the current arrangement most closely aligns with principles of forward-looking, efficient costs.

⁸ Schoonmaker Rebuttal pgs. 22 – 23.

⁹ Conwell Direct, pg. 53.

¹⁰ Conwell Direct, pg. 52.

¹¹ FCC's Advanced Services First Report and Order, CC Docket 98-147 (Issued March 18, 1999).

¹² Schoonmaker Rebuttal pgs. 24-29.

¹³ Conwell Direct, pg. 59.

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Moreover, the Arbitrator finds that the HAI model's algorithm, in calculating the quantity of digital cross-connect systems ports (at the DS3 level) by dividing DS1s by 2 instead of 24, overstates DS3 requirements. Therefore, the model should be modified accordingly. Finally, interoffice cable lengths shall be limited to the most practicable actual route between offices. Petitioner shall provide, as part of the underlying documentation in support of its second re-run costs studies, a chart showing the actual interoffice cable distances.

Issue No. 8 – What are the appropriate cable sizes?

Petitioners – The HAI input of 24 fiber cable to connect offices should be used. The HAI model assumes a hypothetical, forward-looking network, and it would not be cost-effective or forward-looking to place smaller cables.

T-Mobile/Cingular – Petitioners incorrectly assume that they all employ 24-fiber cable for all interoffice cable. Fiber cable sizes should be determined for each Petitioner's network based on their total demand for fibers per FCC rule 51.505, with smaller cable sizes used as appropriate. Absent additional Petitioner-specific cost data, a mix of 8, 12 and 24-fiber cables should be used in the cost studies.

Arbitrator's Decision: The Arbitrator adopts Petitioners' position. It is reasonable to assume that in a forward-looking network, traffic will increase. In light of this assumption, it is reasonable to assume that larger cable will be needed. In addition, the costs associated with underestimating demand far outweigh the costs of overestimating demand.

Issue No. 9 – What is the appropriate amount of sharing of Petitioners' interoffice cabling in order to reflect sharing with services other than transport and termination?

Petitioners – The HAI Model assigns the entire cost of interoffice fiber cable to transport, with a portion of the cost assigned to structures.¹⁴

T-Mobile/Cingular – FCC Rule 51.511 requires unit costs to reflect total costs of a network element divided by (shared among) total demand for the element. Petitioners' cost studies allocate the entire cost of the 24-fiber interoffice cable to the transport system, rather than sharing the cable cost among loops, leased fibers and others. Petitioners' cost studies should be corrected to assume six fibers for interoffice transport systems – two working and four spare, based on the experience of Cass County Telephone.¹⁵

Arbitrator's Decision: Because assigning 100% of the cost of interoffice fiber cable to transport is extreme and unreasonable, the Arbitrator will require the Petitioners to determine exactly what portion of interoffice fiber cable is assigned to transport. Until this determination is made and the cost studies are re-run accordingly, 50% shall be used.

Issue No. 10 – What is the appropriate sizing of Petitioner's forward-looking, interoffice transmission equipment?

Petitioners – HAI input values for transmission equipment.¹⁶

T-Mobile/Cingular – Petitioners incorrectly assume that they all employ an OC-48 add/drop multiplexer, an OC-3 terminal multiplexer and a digital cross connect

¹⁴ Schoonmaker direct, pg. 24-25.

¹⁵ Conwell Direct pg. 69.

¹⁶ Schoonmaker Rebuttal, pgs. 35-36.

system, and that optical regenerators are employed every 40 miles of interoffice cable routes. T-Mobile/Cingular contend that the lengths of these routes are overstated due to the assumed interoffice cable lengths in Issue 7. Transport transmission equipment should be sized to serve the total demand for DS1-equivalent circuits at each Petitioners' switch and reflect either fiber ring or point-to-point transport, depending on the Petitioner's network design. Because Petitioners have not provided the requested data, the Commission should assume OC-3 sized systems and no need for optical regenerators.

Arbitrator's Decision: The Arbitrator directs that an OC-12 system be used. Petitioners state that "at a minimum [Petitioners' witness' engineering staff] recommends nothing smaller than an OC-12 system." This system is recommended and is not inefficient as is the HAI-assumption of OC-48.

Issue No. 11 – What are the appropriate, forward-looking common transport costs for each Petitioner?

Petitioners – Schedules RCS-4 and 5 are the sum of the Common Transport and Dedicated Transport elements.

T-Mobile/Cingular – 20 Petitioners have produced enough information to allow appropriate common transport costs to be computed. Exhibit WCC-1 to Direct Testimony of Conwell.

Arbitrator's Decision: The appropriate forward-looking common transport costs for each Petitioner are the re-run costs filed by Schoonmaker. Seven Petitioners did not provide cost data. The missing data was discussed at the hearing.¹⁷ Even with the allotted time to re-run cost studies, the information has not been produced. The Arbitrator directs that a bill and keep methodology be used until appropriate cost data is produced for these seven Petitioners.

Issue No. 12 – Should any of the costs identified in HAI as dedicated transport be included in Petitioners' transport and termination rates?

Petitioners – Yes. The dedicated transport costs in the HAI model should be included in the Petitioners' transport and termination rates as part of the common transport cost.¹⁸

T-Mobile/Cingular – No. Including dedicated transport costs is duplicative of common transport costs. The corrections for common transport, described in Schedule WCC attached to the direct testimony of Conwell, accurately measure transport costs and it is unnecessary to add additional costs.¹⁹

Arbitrator's Decision: Both parties agree traffic is allocated to common transport. Only costs attributed to common transport should be included in the cost calculation. Schoonmaker, the Petitioners' witness, states that the HAI calculates the total cost of the facility and then allocates the cost to various types of transport facilities such as special access, local interoffice, operator service, common trunks and dedicated trunks. However, Schoonmaker adjusts the assumptions to include dedicated transport, which is to be excluded. The Arbitrator finds that only common transport costs should be included with no additional adjustments to this calcu-

¹⁷ Tr. Volume 4, pg. 373.

¹⁸ Schoonmaker Direct pgs. 32-33.

¹⁹ Conwell Direct pgs. 84-85.

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lation or to any other calculation in which common transport is a component or is derived from such a calculation.

Issue No 13 – What is the appropriate value of Petitioners' forward-looking signaling link costs?

Petitioners – For companies similar to the Petitioners, HAI uses a simplified investment input that it based on an amount per line per wire center so signaling investment is totally unrelated to distance, cable sizes, cable sharing, etc.²⁰ Costs are displayed in RCS-4 and 5.

T-Mobile/Cingular – HAI assumes there is a pair of signaling links for every Petitioners' switch, which is not the case in reality. HAI assumes the signaling links run over the same fictitious interoffice cable routes as common transport (i.e. a cable route from each petitioner switch to the nearest BOC switch). To correct that assumption, Respondents used the actual current costs Petitioners are paying for SS7 interconnection links divided by the HAI estimates of number of messages.²¹

Arbitrator's Decision: Because the HAI model is forward looking, the Arbitrator adopts Petitioners' position, using however, the distances established in Issue No. 7. The Arbitrator specifically rejects Respondents' modification of the forward-looking model with actual (embedded) costs.

Issue No. 14 – Upon what basis should Petitioners and Cingular and T-Mobile compensate each other for traffic exchanged between February of 1998 and the 2001 effective date of Petitioners' wireless termination service tariffs?

The Arbitrator will not address this issue. It is not relevant to the contemplated interconnection agreement, which relates only to future interaction between the parties. This issue is better addressed in the context of a complaint case.

Issue No. 15 – Must Petitioners pay Cingular and T-Mobile reciprocal compensation for intraMTA, wireline to wireless traffic that they hand off to interexchange carriers?

Petitioners – Petitioners have no obligation to pay reciprocal compensation on landline traffic terminated to Respondents by third-party carriers (such as IXC's) where that traffic is neither originated by, nor the responsibility of Petitioners. This is consistent with the Act, FCC rules, industry practice and numerous Commission-approved agreements between small rural ILECs and Wireless Carriers.

T-Mobile²² – The PSC has already rejected Petitioner's argument, ruling in its Alma/T-Mobile Arbitration Report that FCC rules do not include such an exemption. The reciprocal compensation obligation applies to all intraMTA traffic regardless of the type of intermediate carrier used to deliver the traffic for termination.

Arbitrator's Decision: The Arbitrator adopts T-Mobile's position. As the Commission has recently decided in the recent Alma/T-Mobile Arbitration, 47 C.F.R. §51.703 requires reciprocal compensation arrangements. Cingular's failure to provide specific proposed language is not dispositive of this issue because the resolution of this issue is based on a legal, rather than a factual determination. The Arbitrator's conclusion on this issue will therefore be consistent between T-Mobile and Cingular.

²⁰ Schoonmaker Rebuttal pg. 38.

²¹ Conwell Direct, pgs. 87-89.

²² Cingular takes no position on this issue.

Issue No. 16 – Should the Commission establish an IntraMTA Traffic Ratio for use by the parties in billing the termination of traffic?

Petitioners – If the Commission finds that Petitioners have an obligation to pay reciprocal compensation on IXC traffic, then the appropriate traffic factor should be reflective of actual traffic flows as calculated by Petitioners.

T-Mobile/Cingular – Cingular and T-Mobile lack the capability to measure all ICO traffic. Therefore, it is standard industry practice to establish a traffic ratio that Cingular and T-Mobile can apply to the traffic they are billed for by the ICO – to determine the amount of traffic for which the ICO owes reciprocal compensation to Cingular and T-Mobile.

Arbitrator's Decision: Yes, The Commission should establish an IntraMTA Traffic Ratio for use by the parties in billing the termination of traffic because reciprocal compensation should be established.

Issue No. 17 – What is the appropriate IntraMTA traffic balance ratio/percentage?

Petitioners – Schedule RCS shows 84/16 for T-Mobile and 83/17 for Cingular.²³ This is based on the average of the actual Missouri traffic studies performed by Petitioners of Cingular and T-Mobile traffic.

T-Mobile – T-Mobile's studies, as reasonably adjusted for the traffic that could not be measured, establishes an average traffic ratio of 65% mobile-to-land and 35% land-to-mobile.

Cingular – The appropriate intraMTA traffic ratios for Cingular are listed on Confidential Schedule B to the Direct Testimony of Eric Pue.

Arbitrator's Decision: With regard to **T-Mobile**, both T-Mobile and Petitioners want to use averages. However, Petitioners' average is based on actual traffic studies. T-Mobile's is based on actual, reduced traffic, which is unreasonable as nothing in the record supports the 10-percentage-point reduction. The Arbitrator, therefore, adopts Petitioners' position.

With regard to **Cingular**, both Petitioners and Cingular agree on the ratio concept, however, Petitioners want to use an average, while Cingular wants to use individual company ratios. Because Cingular's position is more accurate, the Arbitrator adopts Cingular's position.

Issue No. 18 – Should the agreement allow for modification of the intraMTA traffic ratio?

Petitioners – No objection to this.

T-Mobile/Cingular – If the party can demonstrate, through a proper traffic study, that the traffic ratio has changed, then the agreement should allow for modification of the ratio.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 19 – Should Cingular and Petitioners employ bill-and-keep for compensation purposes if the traffic exchanged between them does not exceed 5000 minutes of use?

Petitioners – Petitioners should be compensated for all of the traffic they transport and terminate for wireless carriers. Cingular's approach would allow it

²³ Schoonmaker Direct, pgs. 52-53.

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to terminate calls freely to some of the Petitioners. Also because Petitioners remain rate base and rate of return regulated, any amount of their costs of service that is not recovered from Cingular would have to be recovered from other customers. In the direct testimony of Mr. Schoonmaker, Petitioners agree to accept quarterly billing.

Cingular – Requiring the parties to bill for amounts under 5000 MOUs per month is not cost-effective. The bills would only be \$10-\$70 per month. When exchange traffic amounts are below 5000 MOUs per month, the parties should exchange traffic on a bill-and-keep basis.²⁴

Arbitrator's Decision: Balancing Petitioners' argument that it should be compensated for calls terminated by Cingular and Cingular's position that it is not cost effective to compensate Petitioners if the minutes of use is below 5,000, the Arbitrator finds that no bills under 5000 MOU should be issued by Petitioners, unless at least three months have passed and no compensation has been made. The resolution of this issue entails and is consistent with the resolution of Issue No. 33.

Issue No. 20 – Should Petitioners be required to provide local dialing for calls to a Cingular NPA/NXX rate centered in Petitioners' EAS calling scopes?

Petitioners – This is ok as long as Cingular has local interconnection in the wire center or exchange to which Petitioners have EAS. Routing is burdensome like in LNP cases.²⁵

Cingular – Local dialing parity is required by §251(b)(3) of the Act and by 47 C.F.R. §51.207. Thus, Petitioner must provide local calling for calls to wireless numbers rate-centered in Petitioners' local calling areas, including any EAS areas.

Arbitrator's Decision: The parties offer no proposed language to the interconnection agreement. A review of the records in this case reveals no filing on this matter despite Cingular's contention to the contrary. Therefore, no language concerning this issue is required to be included in the interconnection agreement. Cingular may later file a complaint if it believes the Petitioners are unlawfully discriminating against it.

Issue No. 21 – Should Petitioners be required to accept and recognize as local all calls from/to Cingular subscribers who have been assigned numbers that are locally rated in Petitioners' switches, if Cingular does not have direct interconnection to those switches?

Petitioners – Petitioners oppose Cingular's proposed language because it would require Petitioners to transport calls outside of their service area – an outcome that would be unduly economically burdensome. Calls from Petitioners' service area to Cingular are currently carried by IXCs. Petitioners do not have facilities outside of their service area, nor the certificate or tariff authority, to carry traffic beyond their exchanges. This issue is currently an "open" issue before the FCC in CC Docket No. 01-92, and it has been addressed recently by the Missouri Commission in a number of cases involving local number portability.

Cingular – The requirement of local dialing parity, established by §251(b)(3) of the Act and 47 C.F.R. §51.207, and the requirement to provide both direct and

²⁴ Pue direct p 20.

²⁵ Schoonmaker Direct, Pgs 61-62.

indirect interconnection, required by §251(a)(1) of the Act, means that Petitioners must recognize local numbers in their switches whether or not a direct interconnection trunk has been established. See *Atlas Telephone Co. v. Okla. Corp. Com'n*, 400 F.3d 1256, 1268 (10th Cir. 2005).

Arbitrator's Decision: The parties offer no proposed language to the interconnection agreement. A review of the records in this case reveals no filing on this matter despite Cingular's contention to the contrary. Therefore, no language concerning this issue is required to be included in the interconnection agreement. Cingular may later file a complaint if it believes the Petitioners are unlawfully discriminating against it.

Issue No. 22 – Should the Cingular contract contain provisions for both direct and indirect interconnection?

Petitioners – No. Neither Cingular nor the Petitioners have requested direct connection, so there is no reason for the agreement to address direct connection. Furthermore, direct interconnection is covered by Section 251(c) of the Act, and Petitioners currently have a rural exemption from this obligation under Section 251(f) of the Act. Thus, Cingular is required to issue a bona fide request for termination of Petitioners' rural exemption pursuant to Section 251(f) of the Act, and the Commission must issue such an order before a Petition for Arbitration is filed. 47 U.S.C §251(f); see also 4 CSR 240-36.040(2).

Cingular – Yes. Both the Act §252(a)(1), and 47 C.F.R. §20.11 require the ICOs to provide both direct and indirect interconnection. Petitioners may not refuse to include direct interconnection provisions in the contract.

Arbitrator's Decision: The parties offer no proposed language to the interconnection agreement. A review of the records in this case reveals no filing on this matter despite Cingular's contention to the contrary. Therefore, no language concerning this issue is required to be included in the interconnection agreement. Cingular may later file a complaint if it believes the Petitioners are unlawfully discriminating against it.

Issue No. 23 – Should Petitioners be entitled to claim the Rural Exemption?

Petitioners – Yes. Petitioners currently have a rural exemption under Section 251(f) of the Act. If Cingular wants a direct connection, then it is required to issue a bona fide request for termination of Petitioners' rural exemption pursuant to Section 251(f) of the Act. Cingular has not yet done so, and the Commission must issue an order before a Petition for Arbitration is filed.

Cingular – This arbitration is limited to Petitioners' obligation arising under Section 251(a) and (b) of the Act. The rural exemption of Section 251(f)(1) applies only to obligations imposed by section 251(c) of the Act. Thus, the rural exemption is irrelevant to this proceeding.

Arbitrator's Decision: Commission rule 4 CSR 240-36.40(2) states:

If the incumbent local exchange carrier is a "rural carrier" subject to the rural exemption contained in 47 U.S.C Section 251(f), then a commission order terminating the rural exemption must precede any petition for arbitration.

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In order for this to have been an issue, Cingular would have had to petition the Commission to terminate the rural exemption Petitioners now have. Cingular has not done so and the Commission has not issued an order terminating the rural exemptions of Petitioners.

Although, this issue is irrelevant, as Cingular argues, Petitioners still have a Rural exemption.

Issue No. 24 – Can CLECs seek arbitration of interconnection agreements with Cingular?

The Commission has dismissed the CLECs from this arbitration. This issue is moot.

Issue No. 25 – Upon what basis should Petitioners and T-Mobile compensate each other for traffic exchanged between 2001 and the BFR date?

This issue is not relevant to the formation of the contemplated interconnection agreement and is better addressed in the context of a complaint case.

Issue No. 26 – Should the Arbitrator authorize the Petitioners and all transit providers to block T-Mobile's traffic until the past compensation issue are resolved?

This issue is not relevant to the formation of the contemplated interconnection agreement and is better addressed in the context of a complaint case.

Issue No. 27 – What InterMTA factors should be established for the interconnection agreement?

Petitioners – The parties have reached agreement on InterMTA factors.

T-Mobile – T-Mobile has agreed to the ILEC-specific interMTA factors set forth by the Petitioner in Appendix G to the Petition.

Arbitrator's Decision – The parties agree on this issue.

Issue No. 28 – Within the traffic deemed InterMTA by applying the agreed InterMTA factor, how should inter- and intra-state InterMTA traffic be addressed?

Petitioners – Petitioners proposed the same ratio of 80% intrastate and 20% interstate that Petitioners (and other small rural ILECs in Missouri) have agreed to with Cingular and other Missouri wireless carriers. Because interstate calls are typically routed to IXCs for termination to ILECs, the preponderance of calls routed over the transit facilities of SBC would be intrastate.

T-Mobile – The interconnection agreement should include an interstate/intrastate allocation of the InterMTA traffic. A reasonable allocation is 80% interstate, 20% intrastate.

Arbitrator's Decision: The Arbitrator finds in favor of Petitioners because Petitioners' position is supported by T-Mobile's own data.²⁶

Issue No. 29 – Should the interconnection agreement include an explicit statement that the compensation obligation for intraMTA traffic is reciprocal and symmetrical?

Petitioners – Petitioners have no objection to including language in the Agreement to the effect that the reciprocal compensation obligation for intraMTA traffic is reciprocal and symmetrical.

²⁶ Pruitt Direct, Attachment 1.

T-Mobile – By federal law, the obligation to pay compensation for IntraMTA traffic is reciprocal and symmetrical.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 30 – Should the interconnection agreement clarify which carrier pays for the trunks and associated costs of connecting each party's network with the third-party transit network?

Petitioners – Petitioners have no objection to including language in the agreement that clarifies that each originating carrier is responsible for paying for any trunks and associated costs it may incur in connecting its network with a third-party transit carrier's network.

T-Mobile – Consistent with the PSC's Alma decision, the agreement should explicitly state that any transport costs for intraMTA traffic are paid for by the originating carrier or its agent – and not by the terminating carrier.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 31 – Should the interconnection agreement require the parties to send all traffic via a third-party LEC when the parties are indirectly interconnected?

Petitioners – No. The Agreement should not require the parties to send all traffic they exchange via third-party LEC when the parties are indirectly interconnected.

T-Mobile – No. The originating carrier (whether LEC or CMRS carrier) has the right to determine what intermediary carrier to use in sending traffic to the terminating carrier.

Arbitrator's Decision: The parties agree on this issue.

Issue No. 32. What billing mechanism should be used to reflect the IntraMTA traffic balance percentage?

Petitioners – If the Commission adopts a traffic factor for intraMTA traffic (#16 and 17), then a net billing arrangement is appropriate. A net billing arrangement is only appropriate, however, for intraMTA traffic. InterMTA traffic, if any, should be identified and removed from total terminating usage before performing a net billing calculation on the remaining intraMTA minutes of use.

T-Mobile – Applying the traffic balance percentage, T-Mobile may accommodate either net billing or cross-billing, both of which present a practical means to efficiently bill under an interconnection agreement.

Arbitrator's Decision: Both parties agree to net billing. However, the Arbitrator emphasizes that net billing should only include intraMTA traffic, rather than interMTA traffic. For calculating the intraMTA traffic, the Arbitrator adopts Petitioners' position that new bills be issued by ILECs based solely on the tandem companies' cellular usage reports.

Issue No. 33 – Should billing be deferred until the amount owing equals at least \$250?

Petitioners – Petitioners do not object to a deferred billing arrangement whereby they would not render a bill totaling less than \$250, but rather accumulate billing information and render one bill for multiple billing periods when the total amount due exceeds \$250; provided, however that the billing party shall render a bill at least once per quarter, even if the bill is for less than \$250.

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T-Mobile – Requiring parties to bill for amounts under \$250 is inefficient for both parties. No late charges or interest should apply to deferred billings.

Arbitrator's Decision: The Arbitrator reaches a conclusion that is consistent with issue No. 19 where Petitioners indicate they are willing to accept quarterly billing. If the monthly billing is less than \$250, the parties should continue to accumulate MOUs. However, accumulating MOUs will not be allowed for more than three months at a time.

Issue No. 34 – Should the interconnection agreement include call-blocking as a remedy for a dispute between the parties.

Petitioners – Yes. It is standard industry practice for a party to be able to terminate service to the other party for failing to comply with the terms of an agreement, including failure to pay undisputed amounts. Blocking provisions have been approved by this Commission for wireless traffic that is delivered without payment. See 4 CSR 240-29.120, Case No. TT-2001-139, 112 S.W.3d 20 (Mo. App. 2003).

T-Mobile – No. The parties agree to apply late charge(s) to disputed payments under the agreement. Call blocking is not needed as a remedy and is contrary to the public interest. If allowed, it should be subject to proper regulatory preapproval, the late fees should be deleted, and the call-blocker(s) should pay the costs of blocking and unblocking.

Arbitrator's Decision: The Arbitrator adopts Petitioners' position. Commission rule 4 CSR 29.120 sets out the requirements for call-blocking. Any language in the agreement must be consistent with this rule.

Issue No. 35 – What should be the effective date of the agreement?

Petitioners – April 29, 2005, is the effective date for the agreements, but this effective date should not prohibit Petitioners from being compensated for pre and post tariff traffic sent to Petitioner by T-Mobile and it should not relieve T-Mobile from complying with Commission orders and tariffs.

T-Mobile – April 29, 2005.

Arbitrator's Decision – April 29, 2005.

Issue No. 36 – Is the transit rate issue raised by Citizens a proper subject of this arbitration?

Petitioners – Yes, Citizens Telephone performs a transiting function for another small rural carrier, Alma. It is appropriate for Citizens to receive compensation for the transiting functions that it performs on T-Mobile's behalf for calls from T-Mobile to Alma. The \$0.01 per minute rate proposed by Citizens has been agreed to by a number of other wireless carriers, including most recently Cingular and U.S. Cellular. This rate is consistent with the prevailing market rate.

T-Mobile – No. Under Section 252(b)(4)(A), the PSC may only consider issues raised in the arbitration petition, and under Section 252(c)(2), the PSC can only adopt rates that are consistent with the TELRIC rules. This issue was not raised in the petition, and Petitioners have not provided any supporting cost data.

Arbitrator's Decision: This issue was not presented in the petition. Furthermore, the record is not sufficiently developed to address whether a \$.01 transiting rate is appropriate. The Commission will not rule on this issue.

IT IS ORDERED THAT:

1. The Petitioners in this matter shall perform a second re-run of their cost studies based on the requirements inputs of this Final Report and submit those second re-run cost studies no later than 4 p.m. on Monday, March 6, 2006.
2. Petitioners shall provide the underlying documentation in the same manner as provided with the first re-run cost studies, with the additional information set forth in Issue #7.
3. This order shall become effective on March 3, 2006.

Kennard L. Jones
Regulatory Law Judge
Arbitrator

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**Application of Sprint Nextel Corporation for Approval of the
Transfer of Control of Sprint Missouri, Inc., Sprint Long
Distance, Inc., and Sprint Payphone Services, Inc. from
Sprint Nextel Corporation to LTD Holding Company.**

Case No. IO-2006-0086

Decided March 7, 2006

Telecommunications §4. Commission approved Sprint's application that outlined a plan to transfer control of a Sprint Missouri, Inc., Sprint Long Distance, Inc., and Sprint Payphone Services, Inc., from Sprint Nextel to a new independent holding company, Embarq.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement submitted by the parties.

On August 23, 2005, Sprint Nextel Corporation submitted an application seeking Commission approval of a plan to transfer control of Sprint Missouri, Inc., Sprint Long Distance, Inc., and Sprint Payphone Services, Inc., from Sprint Nextel to a new independent holding company, then known as LTD Holding Company, and since given the name Embarq.

On December 27, Sprint Nextel, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel filed a nonunanimous stipulation and agreement. The Communications Workers of America, the only intervenor in the case, initially opposed the stipulation and agreement and demanded a hearing. However, the Communications Workers of America subsequently withdrew its objection to the stipulation and agreement and withdrew from the case. As a result, the stipulation and agreement is signed by all current parties and is now unanimous. A copy of the stipulation and agreement is attached to this order as Attachment A.

On February 17, the Commission held an on-the-record presentation regarding the proposed stipulation and agreement. At that proceeding, prefiled written testimony, as well as additional oral testimony, was admitted into evidence.

Sprint Nextel has asked the Commission to approve its plan to spin-off its wireline local service operation into an independent, stand-alone operation. To that end, a new holding company has been created to take control of Sprint Missouri, Inc., Sprint Long Distance, Inc., and Sprint Payphone Services, Inc. Those corporate entities will continue to provide service to their existing customers under the new arrangement, but will have a new corporate parent. That new parent corporation will be a publicly traded corporation that will be independent of Sprint Nextel.

The stipulation and agreement provides that the existing certificates of service authority held by Sprint Missouri, Inc., Sprint Long Distance, Inc., and Sprint Payphone Services, Inc., should remain in effect after the transfer of control to the new corporate entity. However, the parties agree that certain affiliate transaction conditions that were imposed on Sprint Communications Company, L.P., as part

of a stipulation and agreement in Case No. TA-97-269, are no longer needed.¹

In Case No. TA-97-269, Sprint Communications Company was granted a certificate of authority to operate as a competitive local exchange company. The additional affiliate transaction conditions placed restrictions on Sprint Communications Company's CLEC operations in the incumbent local exchange territory of Sprint Missouri. After the spin-off transaction is complete, Sprint Communications Company, which will remain a part of Sprint Nextel, will no longer be affiliated with Sprint Missouri, Inc., making the additional conditions unnecessary.

The parties to the stipulation and agreement agree that the Commission should approve Sprint Nextel's application and allow the spin-off to proceed, subject, however, to several conditions specified in the stipulation and agreement. The parties to the stipulation and agreement agree that, subject to the agreed upon conditions, the transaction proposed in Sprint Nextel's application is not detrimental to the public interest.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case.² Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the stipulation and agreement.

Based on the agreement of the parties and the explanations received at the on-the-record presentation, the Commission believes that the parties have reached a just and reasonable settlement.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on December 27, 2005, is approved as a resolution of all issues in this case (See Attachment A).
2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement.
3. The transaction described in Sprint Nextel Corporation's application, filed on August 23, 2005, is not detrimental to the public interest and is approved, subject to the terms and conditions of the Stipulation and Agreement.
4. The additional affiliate transaction conditions imposed on Sprint Communications Company, L.P. as a result of the stipulation and agreement and report and order in TA-97-269 shall no longer be effective after completion of the transaction approved in this order.
5. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes. The Commission reserves the right to consider

¹ The parties to the stipulation and agreement in TA-97-269 were Sprint Communications Company, United Telephone Company of Missouri, d/b/a Sprint, Staff, and Public Counsel.

² Section 536.060, RSMo Supp. 2005.

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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the ratemaking treatment to be afforded these financing transactions, and their results in cost of capital, in any later proceeding.

6. This order shall become effective on March 17, 2006.
7. This case shall be closed on March 18, 2006.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Kansas City Power & Light Company for Approval of a Rate Schedule Authorizing the Use of Special Contracts and Approval of a Specific Special Contract between KCPL and an Existing Customer.*

Case No. EO-2006-0192
Decided March 16, 2006

Rates §1. This order approves a new rate schedule that allows Kansas City Power & Light Company to enter into contracts with their large customers subject to certain conditions contained in the tariff.

Rates §66. This order approves a new rate schedule that allows Kansas City Power & Light Company to enter into contracts with their large customers subject to certain conditions contained in the tariff.

**ORDER APPROVING PROPOSED RATE SCHEDULE
AND SPECIAL CONTRACT**

Syllabus: This order approves a new rate schedule that allows Kansas City Power & Light Company and large customers to enter into special contracts subject to certain conditions contained in the tariff. It also approves the terms of a specific special contract between the applicant utility and one of its industrial customers.

On November 2, 2005, KCPL applied for Commission approval of a new rate schedule, entitled "Special Contracts – Customer Specific" that would authorize special contracts between KCPL and large customers subject to certain conditions contained in the tariff. KCPL's Application also sought approval of a specific special contract between KCPL and an existing industrial customer.

* Also see Case No. EO-2006-0193. The Commission issued an order approving proposed rate schedule and special contract on March 16, 2006.

KCPL attached to its Application Appendix 1, an illustrative tariff revision of Original Sheet No. 39, and Appendix 2HC, a copy of the special contract between KCPL and an industrial customer. KCPL stated that its Application is contemplated in its Experimental Regulatory Plan that was approved by the Commission in Case No. EO-2005-0329. The KCPL Application was verified by the Affidavit of Tim M. Rush, KCPL's Director of Regulatory Affairs.

The identity of the customers and the specific terms of the special contract attached to the Application as Appendix 2HC were designated as Highly Confidential. KCPL sought a standard protective order from the Commission because it stated that the submitted contract contains "customer specific information and rate information that could be damaging to the commercial and financial interests of both KCPL and the customer if the information was disclosed." In its Application, KCPL proposes that the rate schedule will list, among other non-customer-specific information, the case number wherein each particular special contract was approved by the Commission. On November 14, 2005, the Commission issued its standard protective order and this case has proceeded under that order.

On December 16, 2005, the Staff of the Missouri Public Service Commission filed its recommendation. Staff stated that it had reviewed "the terms of the Special Contract attached to the Application in Appendix 2HC and has no objection to the Commission issuing an Order approving the terms of this Special Contract because no other customer class or individual customer will be adversely affected by its approval." Staff also noted that the proposed tariff sheet explicitly states that customers using the special contracts rate schedule will not affect rate base for regulatory purposes. Staff recommended approval of the proposed rate schedule.

The Commission has reviewed the Application, the proposed tariff, the special contract, and Staff's recommendation. The Commission finds that KCPL is a Missouri corporation in good standing, with its principal office and place of business at 1209 Walnut, Kansas City, Missouri 64106. KCPL is engaged in the business of the generation, transmission, distribution, and sale of electric energy and power in those areas in Missouri certificated to it by the Commission, including the City of Kansas City, Missouri. The relief sought by KCPL in this proceeding and in its Application is sought pursuant to the Commission's earlier Report and Order and the underlying Stipulation and Agreement in Case No. EO-2005-0329.¹

In its Report and Order the Commission stated at page 17:

IMPUTATION OF REVENUES RELATED TO SPECIAL CONTRACTS. KCPL has agreed that for ratemaking determinations, customers using special contracts will be treated as if they were paying the full generally applicable tariff rate for service from KCPL, and other provisions in the special contracts will not affect rate base for regulatory purposes.

Consistent with the Report and Order, KCPL included the following statement as Paragraph 7 in its Application,

¹ Re: *In the Matter of a Proposed Regulatory Plan of Kansas City Power & Light Company*, Case No. EO-2005-0329.

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Pursuant to the Stipulation and Agreement approved in the Report and Order in Case No. EO-2005-0329 and as a specific condition of the Rate Schedule, KCPL agrees that for ratemaking determinations, customers using special contracts will be treated as if they were paying the full generally applicable tariff rate for service from KCPL, and other provisions in the special contracts will not affect rate base for regulatory purposes. As a result, no other customer class or individual customer will be adversely affected by the approval of such Special Contracts.

Furthermore, the Commission determines that under Sections 393.140(11) and 393.150.1, RSMo 2000, the Commission may authorize a contract for the provision of service by an electrical corporation.

The proposed tariff submitted as Appendix 1 to the Application is structured in such a way that no detriment can result to other ratepayers from the proposed relief. The special contract submitted as Appendix 2HC to the Application shows that the applicable industrial customer has unique load and usage characteristics that are appropriately addressed by the terms and conditions of the special contract and proposed rate schedule. The Commission finds that it is in the public interest and reasonable to approve the proposed rate schedule. The Commission further finds that it is in the public interest and reasonable to approve the terms and conditions of the special contract.

IT IS ORDERED THAT:

1. Kansas City Power & Light Company is authorized to file a tariff sheet similar to the illustrative Original Sheet No. 39 attached as Appendix 1 to its Application.
2. The terms and conditions of the submitted special contract, attached to the Application as Appendix 2HC are approved.
3. Kansas City Power & Light Company is hereby authorized to implement such special contract pursuant to its terms and conditions forthwith upon the effective date of the above-referenced rate schedule.
4. This order shall become effective on March 26, 2006.

Davis, Chm., Murray, Clayton,
and Appling, CC., concur.
Gaw, C., dissents, with separate
dissenting opinion to follow.

Dippell, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER STEVE GAW

In this case this Commission has decided that information which is publicly available in another case will be labeled as Highly Confidential (HC) and kept from public view. This Commission's tendency to default in favor of keeping matters

closed has always disturbed this Commissioner. The Commission's Orders on Confidentiality are not sufficiently followed in practice already. The Standard Order of Protection requires that a party requesting HC treatment justify this classification. Unfortunately the practice has been to ignore this portion of the order. It was again ignored in this matter.

In this case, the request for HC designation includes the name of the party contracting and the price charged under the contract. KCPL's request regarding price is arguably consistent with past practice before the Commission regarding special contracts. However, it is difficult to understand the rationale for keeping the information from the public. KCPL customers do not have an option for their electric provider. The argument that disclosure is harmful because it may aid a competitor is diminished significantly.

There is a concern that other similarly situated customers are receiving discriminatory treatment by KCPL. Yet that concern cannot be analyzed and gauged by those customers when the Commission assists in keeping the information private.

It is also disturbing to me that the information in this case about special contracts declared HC was made public in a preceding case. No justification has been given for now making this information non-public. The names of these companies with special contracts were in fact disclosed in the KCPL Experimental Regulatory Plan in Case No. EO-2005-0329. The Order in this case specifically refers to Case No. EO-2005-0329. One of the requirements that information be treated as non-public in the Commission's Order is that it is not already available to the public. Thus, this Commission is again ignoring its own Order in determining that it labels the information in this case HC.

For these reasons, I dissent.

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**In the Matter of the Petition for Arbitration of Unresolved Issues
in a Section 251(b)(5) consolidated with Agreement with T-
Mobile USA, Inc.***

*Case No. TO-2006-0147
Decided March 23, 2006*

Telecommunications § 46.1. The Commission resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. It also combined with TO-2006-0151 which attempted to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. These issues include the method of interconnection, appropriate forward-looking cost methodology, and intercarrier compensation.

APPEARANCES

W.R. England, Brian T. McCartney and Melissa Manda, Brydon, Swearngen & England, PC, 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102. Attorneys for Petitioners.

Mark Johnson, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111. Attorney for T-Mobile USA, Inc.

Paul Walters, Jr., The Walters Law Firm, 15 East 1st Street, Edmond, Oklahoma 73034. Attorney for Cingular Wireless.

Arbitrator: Kennard L. Jones, Administrative Law Judge

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Walter Cecil, Regulatory Economist II, Utility Operations Division, Missouri Public Service Commission.

Bill Voight, Rate and Tariff Examiner Supervisor, Missouri Public Service Commission.

Marc Poston, Senior Counsel, General Counsel Division, Missouri Public Service Commission.

* See pages 214 and 264 for other orders in this case.

ARBITRATION ORDER

PROCEDURAL HISTORY

On October 4, 2005, a number of small rural telephone carriers¹ filed petitions for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, United States Code ("the Act"), and Commission rule 4 CSR 240-36.040. The Petitioners in Case No. TO-2006-0147 ask the Commission to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. The Petitioners in Case No. TO-2006-0151 ask the Commission to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. Because the petitions contained common questions of law and fact and many of the same Petitioners, the Arbitrator consolidated these cases, making Case No. TO-2006-0147 the lead case.

Dismissal of CLECs

On December 20, 2005, the Commission dismissed four CLEC petitioners from this arbitration: Fidelity Communications Services I, Inc.; Fidelity Communications Services II, Inc.; Green Hills Telecommunications Services; and Mark Twain Communications Company.

Motion for Summary Judgment

During the course of the proceedings, T-Mobile filed a motion for summary determination of one of the contested issues; whether Petitioners have an "obligation to pay reciprocal compensation on landline (intraMTA) traffic terminated

¹ The carriers filing under Case No. **TO-2006-0147** are BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, and Steelville Telephone Exchange, Inc.

The carriers filing under Case No. **TO-2006-0151** BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Green Hills Telecommunications Services, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, Mark Twain Communications Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, Seneca Telephone Company and Steelville Telephone Exchange, Inc.

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to [T-Mobile] by third-party carriers (such as IXCs) when that traffic is neither originated by, nor the responsibility of Petitioners.” T-Mobile pointed out that the Commission, on October 6, 2005, in Case No. IO-2005-0468, rejected Petitioners’ position on this issue. Petitioners opposed the motion, stating that there were genuine issues of material fact and that discovery was being conducted with regard to facts that were relevant to this issue.

Commission rule 4 CSR 240-2.117 requires that before a Motion for Summary Judgment may be granted, the pleadings must show there is no genuine issue of material fact. Because all of the pleadings did not show there were no genuine issues of material fact, the Arbitrator denied this motion, reserving consideration of this issue for this report.

Motion to Dismiss Issues having to do with Compensation for Past Traffic

T-Mobile and Cingular filed motions to dismiss issues presented by Petitioners having to do with the delivery of past traffic and the related compensation. The Arbitrator initially granted the motions; however, upon reconsideration, set the ruling aside recognizing the state Commission’s federally mandated obligation to consider all issues presented.²

Oral Arguments

The parties presented oral arguments on March 7, 2006. Petitioners made specific reference to the following issues: 4, 7, 9, 11, 12, 14, 15 and 25. With regard to Issue No. 9, Petitioners argued that the Arbitrator misstated Petitioners’ position. Petitioners’ position is corrected in this order. With regard to Issue No. 11, Petitioners emphasize that all of the Petitioners, including the seven Petitioners discussed in the order, have submitted cost data. The Arbitrator resolved that issue by concluding that a bill-and-keep method for forward-looking common transport costs shall be used for the seven Petitioners until cost data is provided. If the cost data has been provided, then the re-run costs filed by Mr. Schoonmaker shall be used.

Respondents discussed issues 8, 9, 13 and 14. Respondents’ arguments were not persuasive and the conclusions reached by the Arbitrator have not been changed.

Commission rule 4 CSR 240-36.040(19)

This rule states that “[u]nless the results would be clearly unreasonable or contrary to public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator’s decision on that issue.” For issues that cannot be resolved in favor of one party or the other because the results are clearly unreasonable, the Commission will adopt a reasonable position.

STATEMENT OF FINDINGS AND CONCLUSIONS

Issue No. 1 – Must each Petitioner establish its own separate transport and termination rate based upon its own separate costs?

² 47 U.S.C Section 252(b)(4)(C).

Petitioners - Each Petitioner performed a cost study using the HAI forward-looking costs model and developed costs averaging \$0.0871 for T-Mobile and \$0.0843 for Cingular. However, Petitioners proposed to use a rate of \$0.035 in this arbitration. FCC rules do not prohibit a uniform rate for all Petitioners where, as here, it is no greater than their forward-looking costs.

T-Mobile/Cingular - Each Petitioner must establish its own transport and termination rate based upon specific forward-looking economic costs. The Act and FCC Rules do not allow a blanket rate to apply to all Petitioners.

Commission Decision: Consistent with the Arbitrator's Final Decision, each Petitioner need not establish separate transport and termination rates. However, each Petitioner must establish separate costs.³

Issue No. 2 – What is the appropriate transport and termination rate for each Petitioner?

Petitioners - A uniform rate of \$0.035 per minute of use should be used.

T-Mobile/Cingular - Each Petitioner should use different rates, ranging from a low of \$0.0025/MOU for Granby to a high of \$0.0147.MOU for Le-Ru.

Commission Decision: Consistent with the Arbitrator's Final Decision, the appropriate rate for each Petitioner shall be the rate that results from the second re-run cost studies, identified as "Final Arbitration-Uncorrected Direct Trunks" filed on March 10, 2006, and attached to Petitioners' Response to Final Arbitration Report. Petitioners can not force Respondents to pay any single or uniform rate that is higher than the cost for the individual Petitioner, but the parties may agree to any uniform rate applicable to all Petitioners.

Issue No. 3 – What are Petitioners' forward-looking costs to purchase and install new switches?

Petitioners - Petitioners recommend that the value be \$520.14 per line, based on review of this factor in the past and the resulting investment compared to actual investments.⁴

T-Mobile/Cingular - Respondents suggest \$76.56 per line plus adjustments to fill factors and removal of power plant investments.⁵

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts the T-Mobile/Cingular position. Mr. Schoonmaker properly re-ran the cost studies for the switch investment. Although Respondents further argue that this switch investment is too high for those that serve fewer than 700 lines, there is not sufficient evidence in the record, and Schoonmaker's re-run costs, relating to switch investment, are within the bounds of reasonableness.

Issue No. 4 – What is the appropriate value for the usage-sensitive portion of Petitioners' forward-looking end office switching cost?

Petitioners - The HAI Model's input value assigns 70% of switch costs to usage sensitive costs. This is consistent with the FCC's Tenth Report and Order in CC Docket 96-45 and the FCC's "MAG Order."⁶

³ 47 C.F.R. §51.505(e).

⁴ Schoonmaker Direct, pg. 24, lines 11-15.

⁵ Conwell Direct, pg. 31, lines 3-14 – pgs. 46 - 49.

⁶ Schoonmaker Rebuttal pgs. 17 – 18.

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T-Mobile/Cingular – Usage-sensitive costs for switches have fallen dramatically. The current version of HAI uses a 0% end office, non-port fraction. No additional costs are appropriate except interoffice trunk equipment. No more than \$18.33 per line should be used as a flat, monthly rate.⁷

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts T-Mobile/Cingular's position. The "MAG Order" allows, but does not require, an input value of 70%, but also does not preclude a 0% input value. The Commission agrees that switching costs are no longer traffic sensitive.

Issue No. 5 – What is the appropriate floor space attributable to switching?

Petitioners – The HAI Model's input for floor space should be adopted because it reflects an appropriate amount of building and land investment.⁸

T-Mobile/Cingular – Absent a determination of the floor space required for stand-alone/host switches and remote switches with current technologies, floor space should be derived from the response to data request for Cass County Telephone, which is 200 sq. ft for stand-alone/host switches (four bays) and 100 sq. ft for remotes (two bays).⁹

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts T-Mobile/Cingular's position. Petitioners' position of 500 and 1000 square feet is clearly unreasonable. The wireless carriers based their calculations on the Southwestern Bell Missouri space requirements in its Caged Collocation tariff.¹⁰ Moreover, the FCC requires that space increments for collocation be in single bays, which included space for the equipment rack, access to the back of the rack and swing room for rack doors in front.¹¹

Issue No. 6 – What is the appropriate Minutes of Use (MOU) forward-looking end office switching cost for all Petitioners?

Petitioners – \$.0092 for T-Mobile Petitioners and \$.0010 for Cingular Petitioners.

T-Mobile/Cingular – \$.0012 per minute.

Commission Decision: The numbers proposed by each party are average numbers. Consistent with the Arbitrator's Final Decision, the actual numbers are the re-run, end-office switching element of costs in the second re-run cost studies, identified as "Final Arbitration-Uncorrected Direct Trunks" filed on March 10, 2006, and attached to Petitioners' Response to Final Arbitration Report.

Issue No. 7 – What are Petitioners' appropriate, forward-looking interoffice cable lengths?

Petitioners – Interoffice cable lengths are based on HAI assumptions that today, the RBOC would not build facilities to Petitioners' exchanges, as was the case historically.¹²

⁷ Conwell Direct, pg. 47.

⁸ Schoonmaker Rebuttal pgs. 22-23.

⁹ Conwell Direct, pg. 53.

¹⁰ Conwell Direct, pg. 52.

¹¹ FCC's Advanced Services First Report and Order, CC Docket 98-147 (Issued March 18, 1999).

¹² Schoonmaker Rebuttal pgs. 24-29.

T-Mobile/Cingular – Petitioners' switches should be assumed to remain in current locations and the existing interoffice cable distances among these switches should be used to compute transport costs. The distance between Petitioners' switches and the meet points should reflect actual distance.¹³

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts the T-Mobile/Cingular position. For interoffice cable lengths the parties shall adopt the current meet point arrangements, subject to renegotiation if those arrangements change. Moreover, the HAI models algorithm overstates DS3 requirements and shall be modified accordingly. Finally, interoffice cable lengths shall be limited to the most practicable actual route between offices. If not already provided, Petitioners shall provide, as part of the underlying documentation in support of its second re-run costs studies, a chart showing the actual interoffice cable distances.

Issue No. 8 – What are the appropriate cable sizes?

Petitioners – The HAI input of 24 fiber cable to connect offices should be used.

T-Mobile/Cingular – Fiber cable sizes should be determined for each Petitioner's network based on their total demand for fibers per FCC rule 51.505, with smaller cable sizes used as appropriate.

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts Petitioners' position. It is reasonable to assume that traffic will increase, necessitating use of larger cable. In addition, the costs associated with underestimating demand far outweigh the costs of overestimating demand.

Issue No. 9 – What is the appropriate amount of sharing of Petitioners' interoffice cabling in order to reflect sharing with services other than transport and termination?

Petitioners – The HAI Model assigns the cost of fiber cable to nine different types of trunks. While a significant portion of these trunks are tandem trunks, which are assigned to the common transport cost element, another significant portion is assigned to the dedicated transport element, and smaller amounts are assigned to local tandem and local direct trunks.¹⁴

T-Mobile/Cingular – FCC Rule 51.511 requires unit costs to reflect total costs of a network element divided by (shared among) total demand for the element. Petitioners' cost studies allocate the entire cost of the 24-fiber interoffice cable to the transport system, rather than sharing the cable cost among loops, leased fibers and others.

Commission Decision: Consistent with the Arbitrator's Final Decision, assigning 100% of interoffice fiber cable costs to transport is unreasonable. Petitioners shall determine exactly what portion of interoffice fiber cable is assigned to transport. Until this determination is made and the cost studies are re-run accordingly, 50% shall be used.

Issue No. 10 – What is the appropriate sizing of Petitioner's forward-looking, interoffice transmission equipment?

¹³ Conwell Direct, pg. 59.

¹⁴ Schoonmaker rebuttal, pgs. 32-33.

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Petitioners – HAI input values for transmission equipment.¹⁵

T-Mobile/Cingular – Petitioners incorrectly assume an OC-48 add/drop multiplexer, an OC-3 terminal multiplexer, a digital cross-connect system and optical regenerators every 40 miles of interoffice cable routes. These lengths are overstated as discussed in Issue 7. Transport transmission equipment should be sized to serve the total demand for DS1-equivalent circuits at each Petitioners' switch and reflect either fiber ring or point-to-point transport. The Commission should assume OC-3 sized systems and no need for optical regenerators.

Commission Decision: Consistent with the Arbitrator's Final Decision, an OC-12 system shall be used for costing purposes.

Issue No. 11 – What are the appropriate, forward-looking common transport costs for each Petitioner?

Petitioners – Schedules RCS-4 and 5 are the sum of the Common Transport and Dedicated Transport elements.

T-Mobile/Cingular – 20 Petitioners have produced enough information to allow appropriate common transport costs to be computed. Exhibit WCC-1 to Direct Testimony of Conwell.

Commission Decision: Consistent with the Arbitrator's Final Decision, the appropriate forward-looking common transport costs for each Petitioner are the re-run costs in the second re-run cost studies, identified as "Final Arbitration-Uncorrected Direct Trunks" filed on March 10, 2006, and attached to Petitioner's Response to Final Arbitration Report. For the seven Petitioners that did not provide requisite cost data, a bill-and-keep methodology shall be used until appropriate cost data is produced.

Issue No. 12 – Should any of the costs identified in HAI as dedicated transport be included in Petitioners' transport and termination rates?

Petitioners – The dedicated transport costs in the HAI model should be included in the Petitioners' transport and termination rates as part of the common transport cost.¹⁶

T-Mobile/Cingular – Including dedicated transport costs is duplicative of common transport costs. The corrections for common transport accurately measure transport costs and it is unnecessary to add additional costs.¹⁷

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission finds that only common transport costs shall be included with no additional adjustments to this calculation or to any other calculation in which common transport is a component or is derived from such calculation.

Issue No 13 – What is the appropriate value of Petitioners' forward-looking signaling link costs?

Petitioners – For companies similar to the Petitioners, HAI uses a simplified investment input based on an amount per line, per wire center.¹⁸ Costs are displayed in RCS-4 and 5.

¹⁵ Schoonmaker Rebuttal, pgs. 35-36.

¹⁶ Schoonmaker Direct pgs. 32-33.

¹⁷ Conwell Direct pgs. 84-85.

¹⁸ Schoonmaker Rebuttal pg. 38.

T-Mobile/Cingular – HAI assumes a pair of signaling links for every switch, which is not the case. HAI assumes the signaling links run over the same fictitious interoffice cable routes as common transport. To correct that assumption, Respondents used Petitioners' actual current costs for SS7 interconnection links divided by the HAI estimated number of messages.¹⁹

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts Petitioners' position, modified by using the distances established in Issue No. 7.

Issue No. 14 – Upon what basis should Petitioners and Cingular and T-Mobile compensate each other for traffic exchanged between February of 1998 and the 2001 effective date of Petitioners' wireless termination service tariffs?

The Commission will not address this issue in this matter, as it does not relate to future interaction between the parties under the contemplated interconnection agreement.

Issue No. 15 – Must Petitioners pay Cingular and T-Mobile reciprocal compensation for intraMTA, wireline to wireless traffic that they hand off to interexchange carriers?

Petitioners – Petitioners have no obligation to pay reciprocal compensation on landline traffic terminated to Respondents by third-party carriers (such as IXC's) where that traffic is neither originated by, nor the responsibility of, Petitioners.

T-Mobile²⁰ – The reciprocal compensation obligation applies to all intraMTA traffic regardless of the type of intermediate carrier used to deliver the traffic for termination.

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts T-Mobile's position. As the Commission held in the recent Alma/T-Mobile Arbitration, 47 C.F.R. §51.703 requires reciprocal compensation arrangements. Treatment of this issue will be consistent between T-Mobile and Cingular, as described in the Arbitrator's Final Report.

Issue No. 16 – Should the Commission establish an IntraMTA Traffic Ratio for use by the parties in billing the termination of traffic?

Petitioners – The appropriate traffic factor should be reflective of actual traffic flows as calculated by Petitioners.

T-Mobile/Cingular – Cingular and T-Mobile lack the capability to measure all ICO traffic. Standard industry practice is to establish a traffic ratio that they can apply to the ICO-billed traffic to determine the amount of traffic for which the ICO owes reciprocal compensation.

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission shall establish an IntraMTA Traffic Ratio.

Issue No. 17 – What is the appropriate IntraMTA traffic balance ratio/percentage?

Petitioners – Schedule RCS shows 84/16 for T-Mobile and 83/17 for Cingular.²¹ This is based on the average of the actual Missouri traffic studies performed by Petitioners.

¹⁹ Conwell Direct, pgs. 87-89.

²⁰ Cingular takes no position on this issue.

²¹ Schoonmaker Direct, pgs. 52-53.

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T-Mobile – T-Mobile's studies, as reasonably adjusted for the traffic that could not be measured, establishes an average traffic ratio of 65% mobile-to-land and 35% land-to-mobile.

Cingular – The appropriate intraMTA traffic ratios for Cingular are listed on Confidential Schedule B to the Direct Testimony of Eric Pue.

Commission Decision: Consistent with the Arbitrator's Final Decision, with regard to **T-Mobile**, the Commission adopts Petitioners' position.

With regard to **Cingular**, the Commission, the Arbitrator adopts Cingular's position.

Issue No. 18 – Should the agreement allow for modification of the intraMTA traffic ratio?

The parties agree on this issue.

Issue No. 19 – Should Cingular and Petitioners employ bill-and-keep for compensation purposes if the traffic exchanged between them does not exceed 5000 minutes of use?

Petitioners – Petitioners should be compensated for all of the traffic they transport and terminate for wireless carriers. Petitioners agree to accept quarterly billing.

Cingular – Requiring the parties to bill for amounts under 5,000 MOUs per month is not cost-effective. When exchange traffic amounts are below 5,000 MOUs per month, the parties should exchange traffic on a bill-and-keep basis.²²

Commission Decision: Consistent with the Arbitrator's Final Decision, and the resolution of Issue No. 33, the Commission will balance Petitioners' desire to be compensated for calls terminated to them and Cingular's position concerning cost effectiveness. No bills under 5,000 MOU may be issued by Petitioners unless at least three months have passed without compensation.

Issue No. 20 – Should Petitioners be required to provide local dialing for calls to a Cingular NPA/NXX rate centered in Petitioners' EAS calling scopes?

As the parties offered no proposed language to be included in the interconnection agreement, no language concerning this issue is required to be included in it.

Issue No. 21 – Should Petitioners be required to accept and recognize as local all calls from/to Cingular subscribers who have been assigned numbers that are locally rated in Petitioners' switches, if Cingular does not have direct interconnection to those switches?

As the parties offered no proposed language to be included in the interconnection agreement, no language concerning this issue is required to be included in it.

Issue No. 22 – Should the Cingular contract contain provisions for both direct and indirect interconnection?

As the parties offered no proposed language to be included in the interconnection agreement, no language concerning this issue is required to be included in it.

Issue No. 23 – Should Petitioners be entitled to claim the Rural Exemption?

²² Pue direct p 20.

Petitioners – Yes. Petitioners currently have a rural exemption under Section 251(f) of the Act.

Cingular – This arbitration is limited to Petitioners' obligation arising under Section 251(a) and (b) of the Act. The rural exemption of Section 251(f)(1) applies only to obligations imposed by section 251(c) of the Act. Thus, the rural exemption is irrelevant to this proceeding.

Commission Decision: Consistent with Arbitrator's Final Decision, the Commission agrees with Cingular that this issue is irrelevant, but also with Petitioners that they have a rural exemption.

Issue No. 24 – Can CLECs seek arbitration of interconnection agreements with Cingular?

The Commission has dismissed the CLECs from this arbitration. This issue is moot.

Issue No. 25 – Upon what basis should Petitioners and T-Mobile compensate each other for traffic exchanged between 2001 and the BFR date?

This issue is not relevant to the formation of the contemplated interconnection agreement and is better addressed in the context of a complaint case.

Issue No. 26 – Should the Arbitrator authorize the Petitioners and all transit providers to block T-Mobile's traffic until the past compensation issue are resolved?

This issue is not relevant to the formation of the contemplated interconnection agreement and is better addressed in the context of a complaint case.

Issue No. 27 – What InterMTA factors should be established for the interconnection agreement?

The parties agree on this issue.

Issue No. 28 – Within the traffic deemed InterMTA by applying the agreed InterMTA factor, how should inter- and intra-state InterMTA traffic be addressed?

Petitioners – Petitioners proposed the same ratio of 80% intrastate and 20% interstate, as they have done with other Missouri wireless carriers.

T-Mobile – A reasonable allocation is 80% interstate, 20% intrastate.

Commission Decision: Consistent with Arbitrator's Final Decision, the Commission finds in favor of Petitioners because Petitioners' position is supported by T-Mobile's own data.²³

Issue No. 29 – Should the interconnection agreement include an explicit statement that the compensation obligation for intraMTA traffic is reciprocal and symmetrical?

The parties agree on this issue.

Issue No. 30 – Should the interconnection agreement clarify which carrier pays for the trunks and associated costs of connecting each party's network with the third-party transit network?

The parties agree on this issue.

²³ Pruitt Direct, Attachment 1.

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Issue No. 31 – Should the interconnection agreement require the parties to send all traffic via a third-party LEC when the parties are indirectly interconnected?

The parties agree on this issue.

Issue No. 32. What billing mechanism should be used to reflect the IntraMTA traffic balance percentage?

Petitioners – A net billing arrangement is only appropriate for intraMTA traffic. InterMTA traffic, if any, should be identified and removed from total terminating usage before performing a net billing calculation on the remaining intraMTA minutes of use.

T-Mobile – Applying the traffic balance percentage, T-Mobile may accommodate either net billing or cross-billing, both of which present a practical means to efficiently bill under an interconnection agreement.

Commission Decision: Consistent with the Arbitrator's Final Decision, net billing shall include only intraMTA traffic. For calculating that traffic, bills shall be issued by ILECs based solely on the tandem companies' cellular usage reports.

Issue No. 33 – Should billing be deferred until the amount owing equals at least \$250?

Petitioners – Petitioners do not object to deferred billing for bills under \$250, but accumulation and rendering of one bill for multiple periods when the amount due exceeds \$250, provided, that a bill is rendered at least quarterly, even for lesser amounts.

T-Mobile – Requiring parties to bill for amounts under \$250 is inefficient for both parties. No late charges or interest should apply to deferred billings.

Commission Decision: Consistent with Issue No. 19, if the monthly billing is less than \$250, the parties shall continue to accumulate MOUs. However, accumulating MOUs will not be allowed for more than three months at a time.

Issue No. 34 – Should the interconnection agreement include call-blocking as a remedy for a dispute between the parties.

Petitioners – It is standard industry practice for a party to be able to terminate service to the other party for failing to comply with the terms of an agreement, including failure to pay undisputed amounts.

T-Mobile – The parties agree to apply late charge(s) to disputed payments under the agreement. Call blocking is not needed as a remedy and is contrary to the public interest.

Commission Decision: Consistent with the Arbitrator's Final Decision, the Commission adopts Petitioners' position. Commission rule 4 CSR 29.120 sets out the requirements for call-blocking. Any language in the agreement must be consistent with this rule.

Issue No. 35 – What should be the effective date of the agreement?

The parties agree on April 29, 2005.

Issue No. 36 – Is the transit rate issue raised by Citizens a proper subject of this arbitration?

This issue was not presented in the petition. Furthermore, the record is not sufficiently developed to address whether a \$.01 transiting rate is appropriate. The Commission will not rule on this issue.

IT IS ORDERED THAT:

1. The Final Arbitration Report, with amendments to Issues 9 and 11, filed in this case on March 3, 2006, is incorporated into this Order by reference.
2. The parties shall incorporate the Commission's resolution of each issue, as described in this Order, into their interconnection agreements and shall file their interconnection agreements no later than April 22, 2006.
3. The Staff of the Commission shall file a Memorandum and Recommendation advising the Commission that it has reviewed each such proposed interconnection agreement and determined that it complies with this Order and applicable statutes no later than May 2, 2006.
4. This order shall become effective on March 24, 2006.

Davis, Chm., Murray, and Appling, CC., concur.
Gaw and Clayton, CC., dissent, with separate
dissenting opinions to follow.

**DISSENTING OPINION OF COMMISSIONERS
ROBERT M. CLAYTON III AND STEVE GAW**

We respectfully dissent from the majority's approval of the Arbitration Order in this case. The Arbitrator erroneously found that reciprocal compensation is appropriate for intraMTA 1+ dialed calls carried by interexchange carriers. In addition, the Arbitrator improperly awarded forward looking costs which are inappropriate considering the high costs of serving predominately rural areas of Missouri. Because the Order is a significant departure from past Commission decisions, we must disagree with the majority.

Similar to case No. IO-2005-0468 (the *Alma* case), the Arbitrator in this case has concluded that reciprocal compensation applies to exchange access traffic. We disagree for two reasons. First, the evidence in this case indicates that Cingular has taken no position on this issue. The Arbitrator erroneously attempts to apply T-Mobile's position and the *Alma* decision in Cingular's favor and against the Petitioners. Secondly, both this decision and the *Alma* decision are in error by relying on the *Atlas Telephone v. Oklahoma Corporation Commission*, 400 F.3d 1256 (hereinafter referred to as *Atlas II*) case because *Atlas II* did not hold that intraMTA 1+ dialed calls handled by an IXC should be subject to reciprocal compensation. Just as the Texas Public Utility Commission overruled the Texas Arbitrators in *Fitch Affordable Telecom Petition for Arbitration against SBC Texas under §252 of the Communications Act*, Docket Number 29415, this Commission should have found *Atlas II* not relevant to this proceeding and, consequently, rejected the Arbitration Order. By not overturning the Arbitrator's decision on this issue, this Commission is imposing a compensation scheme that mixes reciprocal compensation with access charges. Such a system is simply not workable. Access charges involve a system of meet-point billing that represent a complex web

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of rates, traffic recording, invoice creation, and payment obligations- all pursuant to tariff approval of this Commission. The Arbitrators in this case and the *Alma* case offer no explanation as to how their decisions will impact the tariffs, mechanics, and long-established principles of the access charge system.

The Arbitrators in this case and in *Alma* have simply adopted results of the *Atlas II* case without a full examination of the distinguishable characteristics between the cases. In the *Alma* case, the Arbitrator addressed *Atlas II* in an Order Regarding Motions in Limine. There, the Arbitrator concluded that the geographic MTA boundaries, “and nothing else,” determine whether reciprocal compensation applies to intraMTA traffic. The *Alma* order provided little support for the conclusion that reciprocal compensation applied to IXC-carried traffic other than to state that the *Atlas II* opinion was persuasive. This Arbitration Order appears to adopt the *Alma* decision simply for the sake of consistency.

By agreeing with the Arbitrators and reaffirming the *Alma* decision, this Commission is imposing a reciprocal compensation scheme onto IXC traffic that is counter to years of policies implemented by this Commission and the FCC. The access charge system may be in need of examination and eventual overhaul, but reform of that system should be undertaken systematically and methodically – not dismantled indiscriminately on a company-by-company basis or one arbitration case at a time.

Equally disturbing in the Arbitration Order are the decisions involving the costs of transporting and terminating intraMTA wireless-originated telephone calls. The Arbitrator’s cost decisions are reflected in Issue Number Two entitled “The appropriate transport and termination rate for each Petitioner.” Based on inputs from the HAI forward-looking cost model, the Petitioners initially proposed a uniform rate of \$0.035 per minute. Alternatively, the Commission was asked to support the T-Mobile/Cingular proposal, which ranged from a low of \$0.0025 for Grandby Telephone Company to a high of \$0.0147 for Le-Ru Telephone Company. The Arbitrator’s Final Report suggests rates substantially in line with T-Mobile and Cingular’s proposal.

Inputs to the HAI cost model are reflected primarily in Issues 3 through 13. The outcome of those issues determined the eventual cost for switching, transport, and termination of wireless-originated telephone calls. If the Arbitrator and this Commission were seeking consistency, it would have agreed with Petitioners’ HAI-supported uniform rate of \$0.035 because that rate is consistent with prior Commission findings as well as numerous negotiated rates involving other wireless providers. Instead, the Arbitrator ordered Petitioners to vary the original cost inputs, rerun the cost model, and to report the results by February 24th - an order with which the Petitioners dutifully complied. Apparently not satisfied that those results reflected costs low enough, the Arbitrator, in the Final Arbitration Order, directed Petitioners to again rerun the cost studies which results were submitted on March 10th.

The evidence in this case indicates substantial disagreement among the Parties over the results of the rerun cost studies. We have concerns about what has been characterized as the “pick and choose” method of identifying forward looking inputs and assumptions on the one hand, and the use of embedded inputs

on the other hand. Given the complexity of the task and the short amount of time with which the revised studies were performed, we question whether the revised cost studies have undergone sufficient scrutiny to produce satisfactory results. We are concerned that the final rates are not reflective of the higher costs associated with providing service in predominately rural areas by carriers predominately rural in nature. Our worry is that the final cost study is too reflective of the costs of larger carriers operating primarily in urban areas, where costs are much lower. In our opinion, the final cost study may impermissibly and inappropriately shift transport and termination costs to end users and permit Respondents' use of rural networks at below cost rates.

A more reasoned approach would have been for the Commission to set interim rates subject to true-up and allow a more thorough analysis of the revised cost studies. Instead, the Commission continues to insist on resolving even the most difficult cost related issues in the belief that it must conclude all decision making within 90 days. We believe the stakes are simply too high to reach results that are not fully evaluated. As with its decision regarding intraMTA 1+ dialed traffic, the results of the cost aspects of this case represent a significant departure from prior Commission decisions. We believe the evidence in this case supports results more in line with prior decisions regarding the costs to provide telephone service.

For the foregoing reasons, these Commissioners respectfully dissent.

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**In the Matter of Embarq Communications, Inc.'s Tariff to Reflect
a Name Change from Sprint Long Distance, Inc., to Embarq
Communications, Inc.**

Case No. TN-2006-0364

Decided March 30, 2006

Telecommunications §1. The Commission recognized Sprint Long Distance, Inc.'s name change to Embarq Communications, Inc. The Commission also approved the company's motion for expedited treatment of its tariff pages in that there were no textual changes, other than the company name, and there is no negative effect on its customers.

**ORDER RECOGNIZING CHANGE OF CORPORATE NAME
AND APPROVING TARIFF SHEETS ON EXPEDITED BASIS**

On March 23, 2006, Sprint Long Distance, Inc., filed an application with the Public Service Commission seeking recognition of a change of name from Sprint Long Distance, Inc., to Embarq Communications, Inc. With the application for name change, Sprint also filed revised tariff sheets reflecting the new name and a Motion for Expedited Treatment seeking approval of its tariff by April 3, 2006. In its Motion for Expedited Treatment, Sprint claims no textual changes to the tariff are necessary except to replace Sprint Long Distance, Inc., with Embarq Communications, Inc., that no customer will be harmed by expedited approval of the tariff as no rate, term or condition of any service is changed, and that there are numerous steps that must be completed in order to effectuate the transfer of control.

Sprint included with its initial filing a certificate from the Missouri Secretary of State indicating the change of name from Sprint Long Distance, Inc., to Embarq Communications, Inc. The applicant was certificated to provide interexchange telecommunications services in Commission Case No. LA-2006-0075.

The Staff of the Commission filed a memorandum on March 27, 2006, stating that it had reviewed the applicant's filing and proposed tariff sheets and had no objection to its approval. The Staff recommended that the new name be recognized, that the proposed tariff sheets be approved to become effective on April 3, 2006, and advised the Commission that applicant's customers had been notified of the name change. The Staff notes that the name change continues the process begun in the transfer of control case, Case No. IO-2006-0086, wherein Sprint proposed to transfer customers to Embarq on or about April 29, 2006. Sprint seeks authority to use the new name in advance of that date. The Staff has no objection to the request for expedited treatment.

The Commission has reviewed Sprint's filing, the proposed tariff sheets, and Staff's recommendation and finds that the new name should be recognized. The Commission further finds that Sprint has complied with Rule 4 CSR 240-2.080(16) regarding expedited treatment in that it has provided the date by which the Commission is requested to act, shown that there will be no negative effect on its customers, and stated that it filed its pleadings as soon as it could have after

receiving all necessary documentation. The Commission finds that the proposed tariff sheets reflecting the name should be approved in an expedited manner.

IT IS ORDERED THAT:

1. The new name of Sprint Long Distance, Inc., as Embarq Communications, Inc., is recognized.
2. The Motion for Expedited Treatment is granted.
3. Embarq Communications, Inc.'s tariff, identified in Commission records as P.S.C. Mo. Tariff No. 1 Interexchange Telecommunications Services Tariff, YX-2006-0731, is approved to become effective on April 3, 2006.
4. This order shall become effective on April 3, 2006.
5. This case may be closed on April 4, 2006.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Reed, Regulatory Law Judge

In the Matter of Missouri-American Water Company's Application for Authority to Issue up to \$57,490,000 in Aggregate Principal Amount of Its General Mortgage Bonds in Conjunction with the Refunding of Outstanding Issues of Tax Exempt Bonds.

Case No. WF-2006-0331

Decided April 4, 2006

Water §28. The Commission granted Missouri-American Water Company its application which asked for authority to issue general mortgage bonds in an aggregate principal amount of up to \$57,490,000 for the purpose of discharging or refunding existing indebtedness.

ORDER GRANTING FINANCING APPLICATION

On February 17, 2006, Missouri-American Water Company filed its Application asking the Commission for authority to issue general mortgage bonds in an aggregate principal amount of up to \$57,490,000, for the purpose of discharging or refunding existing indebtedness.

Missouri-American seeks authority to enter into an arrangement with the State Environmental Improvement and Energy Resources Authority (EI ERA) whereby EI ERA would issue tax-exempt revenue bonds and loan the proceeds to Missouri-American for qualifying projects. Missouri-American would issue General Mortgage Bonds to secure its obligations on the EI ERA revenue bonds.

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Missouri-American currently has outstanding five series of EIERA bonds totaling \$57,490,000. Missouri-American asks for authority to issue one or more new series of EIERA bonds to refinance some or all of those existing EIERA bonds at a lower interest rate. It will refinance those bonds only if doing so will result in a net interest cost savings on a net present value basis.

On March 24, the Commission's Staff filed a Recommendation and Memorandum regarding Missouri-American's Application. Staff recommends that the Commission approve the Application subject to three routine conditions. On March 27, Missouri-American filed a pleading indicating that it does not object to the conditions proposed by Staff.

Based on Missouri-American's Application and the Recommendation and Memorandum of Staff, the Commission concludes that the Application should be granted. The Commission will require Missouri-American to comply with the conditions requested by Staff.

As required by Section 393.200, RSMo 2000, the Commission finds that the money, property or labor to be procured or paid for by the issuance of the bonds proposed in Missouri-American's Application is or will be reasonably required for the purposes specified in the Application and that such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income.

IT IS ORDERED THAT:

1. Missouri-American Water Company's Application is granted.
2. Missouri-American Water Company is authorized to create one or more series of its General Mortgage Bonds under its Indenture of Mortgage to First Union National Bank (formerly the Fidelity Bank) and UMB Bank and Trust, N.A. (formerly Mercantile Bank of Western Missouri, Successor to William B. Ebert) as Trustee, dated June 14, 1968, as amended and supplemented, including by the First through the Seventeenth Supplemental Indentures and to be amended and supplemented, including by a Supplemental Indenture for each new series of General Mortgage Bonds, each such series to be issued at such time, or from time to time, to be of such aggregate principal amount as shall be determined by Missouri-American, provided the aggregate principal amount of all such series shall not exceed \$57,490,000, bearing interest, including any applicable discount, at a rate not greater than two percentage points over the Bond Buyer Revenue Bond Index as published in The Bond Buyer on the day prior to the date on which the terms and conditions of the bonds are determined having maturity of not more than thirty (30) years, and having such designation and other redemption and sinking fund provisions, if any, and other terms and provisions as shall be determined by Missouri-American, all to be set forth in the Supplemental Indenture relating to such series of bonds, as to be executed, and as to be set forth in Appendices 1 a through x (as applicable).
3. Missouri-American Water Company is authorized to deliver each such series of its General Mortgage Bonds to the Trustee under the applicable EIERA Bond Indenture in accordance with the terms of a loan agreement or agreements between Missouri-American and the State Environmental Improvement and Energy Resources Authority to secure tax-exempt revenue bonds for Missouri-American's qualifying projects under the Act.
4. Missouri-American Water Company is authorized to execute and deliver to the First Union National Bank (formerly the Fidelity Bank), and UMB Bank and Trust, N.A. (formerly Mercantile Bank of Western Missouri, successor to William B. Ebert) as Trustees, a Supplemental Indenture with respect to each such series of General Mortgage Bonds, each to be dated on or prior to the date of the initial issuance of any General Mortgage Bonds of

the series of General Mortgage Bonds to which such Supplemental Indenture relates, supplemental to the Indenture of Mortgage dated June 14, 1968.

5. Missouri-American Water Company is authorized to create and make effective the lien of the Indenture of Mortgage, dated as of May 1, 1968, as amended and supplemented, and as to be amended and supplemented, including by a Supplemental Indenture for each new series of General Mortgage Bonds, on the property of Missouri-American in the state of Missouri to secure each new series of General Mortgage Bonds, provided that the aggregate principal amount thereof shall not exceed \$57,490,000.

6. Missouri-American Water Company is authorized to amortize any premium or discount expenses incident to the issuance of General Mortgage Bonds over the life or lives thereof.

7. Missouri-American Water Company is authorized to enter into, execute, deliver and perform the necessary arrangements or other documents necessary to effectuate the transactions herein above described.

8. Missouri-American Water Company is authorized to take such other actions as may be reasonably necessary to complete the subject transactions.

9. The proceeds from the issuance and sale of bonded indebtedness shall be used by Missouri-American Water Company for the purposes herein above described.

10. The Commission's approval of this Application is conditioned upon Missouri-American Water Company's compliance with the following conditions:

A. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes. The Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions, and their results in cost of capital, in any later proceeding.

B. Missouri-American Water Company shall file with the Commission all final terms and conditions of the proposed financing, including, but not limited to, the aggregate principal amount to be sold or borrowed, price information, estimated expenses, and loan or indenture agreement concerning each issuance.

C. Missouri-American Water Company shall file with the Commission, upon refunding of any outstanding debt, the net present value calculations indicating the amount of interest cost savings.

11. This order shall become effective on April 14, 2006.

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Woodruff, Deputy Chief Regulatory Law Judge

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The City of Kansas City, Missouri, The Planned Industrial Expansion Authority of Kansas City, Missouri, Boulevard Brewing Associates Limited Partnership, a Missouri Limited Partnership, d/b/a Boulevard Brewing Company, Complainants, v. Kansas City Power & Light Company, Respondent.

Case No. EC-2006-0332

Decided April 6, 2006

Electric §39. The Commission ordered that KCPL was not required to pay for the relocation or burial of power lines on Belleview Ave. When the City requires KCPL to relocate its facilities on 26th Street according to its usual practice, KCPL must comply with the cities request at their own expense.

Expense §35. The Commission determined that Boulevard cannot perform any work on the KCPL facilities unless authorized and approved by KCPL, pursuant to its tariffs.

Appearances

Heather A. Brown, Assistant City Attorney, Office of the City Attorney, 28th Floor, City Hall, 414 East 12th Street, Kansas City, Missouri 64106, for City of Kansas City, Missouri.

Jeremiah D. Finnegan, Finnegan, Conrad & Peterson, 3100 Broadway, 1209 Penntower Office Center, Kansas City, Missouri 64111, for Boulevard Brewing Company.

Curtis D. Blanc, Senior Attorney-Regulatory, 1209 Walnut, P.O. Box 418679, Kansas City, Missouri 64106, for Kansas City Power & Light Company.

REGULATORY LAW JUDGE: Colleen M. Dale, Chief Regulatory Law Judge

REPORT AND ORDER

This matter involves a dispute between Petitioners, Boulevard Brewing Associates, LP ("Boulevard"), the City of Kansas City, Missouri ("the City") and the Planned Industrial Expansion Authority ("PIEA"), and Respondent, Kansas City Power & Light Company (KCPL), over who should pay for certain improvements to KCPL's facilities pursuant to the approved General Development Plan ("Plan").

PROCEDURAL HISTORY

On February 21, 2006, the Petitioners filed their joint Complaint and Motion for Expedited Treatment. In the Complaint, two counts were asserted. In the first count, Petitioners sought an order directing KCPL to move certain facilities on 26th Street at KCPL's expense and to relocate underground certain KCPL facilities on Belleview Avenue at KCPL's expense. In the second count, Boulevard requests, if Petitioners fail to prevail on the first count regarding utility lines on either street, the Commission determine whether KCPL's asserted costs for such relocations

of facilities are reasonable, lawful and non-discriminatory; that KCPL be required to account for its calculations of relocation costs; that KCPL be ordered to not collect tax on Contributions In Aid of Construction (CIAC) from Boulevard; that KCPL provide access to cost records of previous line relocations; that KCPL be ordered to permit Boulevard to utilize independent contractors to complete the relocation work; that KCPL be prohibited from installing or requesting payment from Boulevard for any equipment or facilities included in the estimates that will benefit KCPL and other ratepayers; that KCPL be ordered to file a tariff outlining the costs and procedures for relocating an overhead line; that KCPL be ordered to submit an objective formula for calculating line extensions and relocation costs and revenue credits; and for such other and further relief authorized by law. Boulevard also filed its Motion for Expedited Treatment.

KCPL filed its Answer on March 2, 2006, with a general denial of the allegations made in Counts I and II relying on its tariffs and its franchise agreement. KCPL's reasoning supporting its denial of liability was based on the electric facility relocations being for a private entity, not ordered by the City and subject to various tariffs setting out certain cost recovery mechanisms.

The Commission granted the Complainants' Motion for Expedited Treatment and an evidentiary hearing was held on March 6-8, 2006. All parties except the City prefiled exhibits, and all testimony was given at the hearing. No pre- or post-hearing briefs were filed; opening and closing statements were made in lieu thereof.

The Complainants, and also KCPL, are responsible for bringing this dispute to the Commission at the last minute. Apparently, neither party sought to apprise the Staff of the dispute and see if the Staff might assist in resolution of this matter. The Commission has endeavored to afford the parties expedited treatment, but having done so, the Commission wants KCPL and the Complainants to understand that the Commission does not encourage untimely filings of disputes and may not be able to expedite treatment in the future. The discovery requests raised by Boulevard in its Complaint are, among other things, untimely, and are denied.

STATEMENT OF FACTS

The Complaint involves an area (the "Planning Area") located near downtown Kansas City made up of 12 property parcels amounting to 3.10 acres. The area is bounded by three public roadways and a part of a fourth, on the Northwest by Southwest Boulevard, which intersects with 26th Street on the South edge, by Bellevue Avenue on the South and a small strip of 25th Street on the Northeast.

The entire parcel lies within the "Summit TIF," which was approved by the City Council as a Tax Increment Financing District on August 31, 1995. As part of that action, the City declared the area blighted, describing the area as unsanitary or unsafe, having deteriorating structures or fostering conditions that endanger life or property. Section 100.400.1(2), RSMo. The "blighted" area was found to be economically underutilized and a menace to public health safety, morals or welfare.

The PIEA is a public body corporate and politic exercising the powers, rights and duties of a Planned Industrial and Expansion Authority pursuant to Sections 100.300-100.620, RSMo. The PIEA engaged Development Initiatives, Inc., to study whether the Planning Area continued to be blighted (See Section 100.010, et seq.

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RSMo). On July 16, 2004, the report was returned to the PIEA, and the PIEA recommended that the City Council re-designate the area blighted, unsanitary or an underdeveloped industrial area. (PIEA Resolution No. 893) In September 2004, the City Council, by Ordinance No. 041081, declared the area blighted, which made the area eligible for special development options available to prospective developers.

Following requisite public notice and consideration, the PIEA adopted Resolution No. 936, accepting Boulevard Brewery's proposal and sending notice to the City Council on December 16, 2004. (Exhibit 5).

The Plan called for Boulevard to expand its existing brewery, include a conference center, and upgrade packaging and distribution services to permit increased sales, visitors and traffic. From the City's perspective, "[t]he intent of this Plan [was] to remediate various blighting factors within the Planning Area, including . . . the remediation of certain environmental liabilities, the modernization and/or construction of new facilities and the replacement of curbs, gutters, and sidewalks, as well as removal of overhead utility lines." (Exhibit 15, p. 20). The City sought to remove blight, upgrade or clean-up the neighborhood and make the area function economically, enhance quality of life, increase property taxes, and encourage additional investment (Exhibit 14, p. 35).

Boulevard was required to follow the Land Use Plan of the Area, adhere to all city codes and ordinances, complete a traffic study of the area and upgrade or repair all of the public services The Plan stated:

It may be required that as part of a specific project plan, and to remedy blighting conditions, certain utilities will be relocated or buried. Any changes will be coordinated with the City of Kansas City, Missouri and provided at the Developer's expense. (See Exhibit 14, pp. 34, 36)

In December 2004, Boulevard submitted a Traffic Impact Study performed by Olsson Associates. (Exhibit 13) The Study recommended left and right turn lanes for westbound 26th Street turning onto Southwest Boulevard "to reduce delay for the turning vehicle traffic on 26th Street." This required widening 26th Street and relocation of utility poles in the public right-of-way to the opposite side of the street. In addition, the Study recommended additional signaling and striping and vacating a portion of Bellevue Avenue as a city street. The Study was not limited to Boulevard's vehicles.

As noted above, the City was to vacate a portion of Bellevue for use as off-street parking and other purposes. As utility lines on poles serving customers other than Boulevard run the length of Bellevue Avenue, the City retained a utility easement through the entire strip of roadway.

DISCUSSION

Count I

26th Street Utility Relocations

In Count I, the City, the PIEA and Boulevard seek a declaratory ruling that KCPL must pay to relocate certain utility facilities within the Planning Area. The first dispute

involves the proposed relocation of the utility lines on 26th Street, in light of the proposed widening discussed above. The Plan further suggests relocating all of the poles on 26th Street to the South side of the street to avoid multiple crossings of lines above the street, even though the street would not be widened at that section of 26th Street. The parties agree that the lines and poles are in the public right-of-way and will remain so if the Plan advances. Complainants argue that removal and relocation should be at the utility's expense; KCPL argues that the City has not directed it to move the lines and that the Plan specifically states that the developer will incur the costs.

This issue hinges on whether the City is exercising a governmental or a proprietary function or purpose and whether the relocation is mandated by the City. The City controls the public rights-of-way, and can, to a certain degree, control their use.

In *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W. 2d (Mo. 1997), St. Louis, by ordinance, vacated its right-of-way in one block of a public thoroughfare in favor of an urban renewal project that included "the Convention Plaza and a privately owned and operated hotel ... under the authority of the Land Clearance of Redevelopment Authority Law." The Missouri Supreme Court stated that the primary purpose of the project was the redevelopment or renewal of what was implicitly a blighted area of St. Louis. *Id.* at 33. The Land Clearance for Redevelopment Authority (Authority) notified Union Electric to vacate a city block, without which vacation the project could not proceed. *Id.* at 31. By the express terms of its franchise with St. Louis, Union Electric had agreed to "such restrictions, regulations and qualifications as may be prescribed by said Board" of St. Louis. *Id.* at 32. Union Electric's right to use any public right-of-way was subject to a reservation of the right by St. Louis to direct relocation of facilities installed in the street. *Id.* The Court held that the utility served in accordance with its franchise and had no choice but to comply with St. Louis' order to vacate at its own expense.

The Court stated that the issue of who bears the cost of relocation depends on whether the relocation is necessitated by the municipality's exercise of either (1) a proprietary function or purpose, or (2) a governmental function or purpose:

"The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity * * *, (or) public convenience (and) security require it, * * * at * * * (its) own expense. * * * (But) (t)he general rule that the utility must bear the relocation costs has been held inapplicable where the relocation of its facilities has been necessitated by the municipality's exercise of a proprietary rather than a governmental function or purpose."

Id. at 32.

The Eastern District Court of Appeals, on March 28, 2006, in *City of Bridgeton v. Missouri-American Water Co.*, Case No. ED86292 ("*Bridgeton v. Missouri-American Water*") stated that if the primary beneficiary of a governmental act is

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private rather than public, then the private beneficiary rather than the public utility should pay for the relocation of utility facilities. In the present case, KCPL's witness, Tim Rush, testified that if the City demanded removal or relocation of facilities located in a public right of way for the public good, KCPL would comply. (Transcript at p.282).

The City and the PIEA have enacted new Resolutions, 060288 on March 9, 2006 and 060339 on March 23, 2006, by the City Council, and 1083 on March 1, 2006, by the PIEA, modifying the paragraph on page 34 of the Development Plan to clarify that the city will not bear the cost of relocating or burying utility facilities to remedy blight (Exhibit 4).

None of the resolutions directly states that the costs of relocation or burying should be assigned to either the utility or the developer. Resolution 060339 refers to the authority of the Commission:

Section 1: That the Council hereby states that the purpose of its adoption of Resolution No. 060288 was not to determine the responsibility for payment of costs for relocation or undergrounding of utilities in the Plan Area as between the developer and any affected utility (which is governed by the Public Service Commission pursuant to state law) but to stress that in no case shall the City or the Planned Industrial Expansion Authority of Kansas City, Missouri, be responsible for such costs.

The evidence before us suggests that the City has found the area to be blighted, used tax increment financing and condemnation powers, through its agent, the PIEA, issued a request for proposals for redevelopment. The City endorsed the Plan and developer to accommodate increased economic activity, productive use of the area and overall improvement in the quality of life and appearance of the Planning Area. In turn, this will increase tax base and rolls, more appropriately use the land in question, upgrade area facilities, increase traffic and improve conditions for residents and businesses in the Area.

As noted above, the Plan-mandated traffic study requires new turning on 26th Street, which necessitates moving the utility poles. KCPL is required to move its facilities to allow the Development Plan to proceed. The lines are located in the public right-of-way and the City controls that space (Transcript at p. 282).

KCPL argues that in the present matter, the City acts in a "proprietary rather than governmental function or purpose." KCPL's arguments are misplaced. It is clearly a governmental role to declare an area blighted. While the City may own the real property to effect the financing arrangement, the City will not compete or act otherwise to pursue its own proprietary interest. The City embodies the public effort to remove blight and make its streets and public areas safe for residents and visitors.

KCPL also cites *Home Builders Assn. Of Greater St. Louis, et al. v. St. Louis County Water Co.* 784 S.W.2d 287 (Mo. App.1989), in support of its position. In that case, the Court held that private developers complying with municipal mandates to modify public facilities could not force utilities in the right-of-way to perform relocations or modifications to their facilities without paying the cost the projects

were private projects and only incidentally public projects. In the present case, the entire project began as a public effort to remediate blight and to improve the conditions of the Plan area, distinguishing it from the *Home Builders* case. Although the *Bridgeton* case is too recent to have been cited by either party, it appears more similar in fact to the *Home Builders* case than the *Union Electric* case. In the *Bridgeton* matter, a private development necessitated subsequent improvements to public facilities. Again, the project in the instant case arose from the City's initiative to redevelop a blighted area. Although a portion of the project may confer a benefit to a private entity, the public benefits clearly derive from a public project.

Finally, KCPL argues that language in the Plan relieves it from responsibility in relocating the utility facilities and cites the following to support its position:

Proposed Changes in Public Utilities

It may be required that as part of a specific project plan, and to remedy blighting conditions, certain utilities will be relocated or buried. Any changes will be coordinated with the City of Kansas City, Missouri and provided at the Developer's expense. P.34

Public Improvements

It is the objective of this Plan to require any developer or developers to make all necessary public improvements to streets, utilities, curbs, gutters and other infrastructure if the redevelopment project creates a need for improved public facilities. All improvements will be coordinated with the City of Kansas City, Missouri. Additionally, as part of this Planning Area, once a project is Proposed and a developer is selected, as part of the redevelopment project, it the City will require the property to be platted. P. 36

Boulevard and the City responded with Exhibit 4, as discussed more fully above. With respect to all other public improvements, the City has made clear that it is not responsible for payment for any of them, including not only replacements of curbs and sidewalks, but also the movement of fire hydrants. (Tr. At 92-94)

Based on the foregoing, the Commission finds that the City declared the area as blighted, approved the General Redevelopment Plan, required the Traffic Study, which has necessitated the widening of the road, and, in turn, required the relocation of the utility poles at the intersection of 26th Street and Southwest Boulevard without making that specific demand to KCPL. Therefore, the City must, through its usual procedures, notify KCPL that the street is to be widened and deliver to KCPL the traffic study and street plans. KCPL shall comply with the City's requirements according to its customary practices. If the City refuses or fails to issue its mandate, then KCPL is not required to relocate the facilities absent an agreement by it to do so.

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As to the relocation of utility poles on 26th Street between the alleyway and Belleview, the evidence indicates that possibly safety, convenience or engineering require the relocation of all of the facilities on 26th Street. KCPL has the right and the responsibility to ensure its facilities serve its customers and the general public in a safe and reliable manner. If KCPL determines that it is necessary to relocate its facilities the entire length of 26th Street in order to meet safety standards, then it will incur those costs.

Much of this dispute could have been resolved without resort to hearing if the City had taken more of a leadership role, clearly establishing goals and communicating unequivocally. KCPL has repeatedly stated its customary policy about movement of facilities when streets are widened. All of KCPL's criteria are met for a portion of 26th Street, yet the City never stepped up to the plate and told KCPL to move that facilities so the street could be widened. The vagueness of the Plan, including use of words such as "removal" when removal was not required, contributed significantly to the Parties' inability to negotiate a settlement.

Belleview Avenue Facility Relocations

The second request for relief in Count I involves utility modifications on Belleview Avenue. This road has been vacated by the City, except for a reservation of a utility easement, and has become the private property of Boulevard. The City, the PIEA and Boulevard demand the utility lines and poles that run along the road be buried underground. This request is troublesome for several reasons. The Plan clearly calls for the removal of overhead power lines, however, the Plan does not specify to which lines it refers. Although it appears to be a blanket statement, the City does not appear to apply it to the lines on 26th Street or in the alleyway. The reference is too vague to be binding.

An alternative explanation is an intention to establish a policy preference to relocate facilities underground. However, the City does not have unlimited power to order the utility to take certain actions. Sheet No. 38 of KCPL's PSC approved tariff reads:

If any Municipality or other governmental subdivision (hereinafter referred to as the "Municipality"), by law, ordinance or regulation requires the Company to construct lines and appurtenances or other facilities designed for any Distribution or Transmission voltages (hereinafter referred to as "facilities") underground for any new or existing facilities in the Municipality when the Company, absent from such ordinance or regulation, would construct or continue to maintain the facilities overhead, and where the recovery of the additional cost for such underground is not otherwise provided for in the Company's General Rules and Regulations Applying to Electric Service, the cost of the additional investment required by the Company to construct the facilities underground shall be assessed against the Municipality.

Before the Company starts placing any facilities underground pursuant to this Rider, the Municipality shall provide adequate

assurance to the Company that the Municipality's obligations to pay for such facilities are valid, lawful and enforceable against the Municipality.

Accordingly, if the City requires utility lines to be placed underground as a matter of policy, then the City is required to pay. Moreover, the city has not adopted a specific ordinance requiring burial in reference to the utility's franchise.

Count II

Boulevard alone seeks additional relief in eight prayers in Count II, which relate to passing costs to customers. Since the Commission has disposed of the issues concerning relocations on 26th Street, the prayers in Count II only relate to lines on Belleview Avenue.

1. Boulevard challenges proposed costs submitted to it by KCPL for the various line relocations as unreasonable, unlawful and discriminatory. Boulevard asserts that the estimated cost for completion of the work is overstated. However, Boulevard's estimate appears to be incomplete. With a cursory review of Boulevard's numbers, KCPL's witness was able to readily identify facilities necessary to the provision of service that had not been included in Boulevard's estimate. Boulevard has the burden of establishing that the proposed costs are unreasonable, but fails to meet that burden.

2. Boulevard demands an accounting for how costs are calculated in the expenses to be levied against Boulevard for line and pole relocations. The Commission finds that KCPL must provide, if it has not done so already, a detailed account for how it calculates the expenses to be paid, according to the formulae set forth in its tariff.

3. Boulevard objects to the application of a Contribution in Aid of Construction tax of 25%. Both parties produced letters from the IRS in support of their positions on the issue, although neither letter was directly on point. Boulevard may, at its own expense, seek a letter ruling from the IRS that no CIAC tax is owed for the facilities renovation on Belleview. If the IRS issues such a ruling, then KCPL will promptly refund the amount collected for CIAC tax.

However, as to the burial of power lines on Belleview, it appears to confer a public benefit of blight abatement. If Boulevard chooses to undertake the expense of burying the lines, then KCPL shall not collect and remit CIAC tax for that project. If the IRS later determines that the burial of the power lines does not confer a public benefit and that CIAC tax is owed, then Boulevard shall remit the tax and any associated interest and penalties to KCPL for payment to the IRS.

4. Boulevard demands past KCPL records illustrating line and pole relocation costs over the past five years. This is a discovery request and it is too late in the process for such records to be relevant to the conclusion of the case. Moreover, the discovery request is broad and overly burdensome. KCPL is not required to gather or release to Boulevard the requested records.

5. Boulevard demands that it be permitted to use its own contractors in the construction of the new facilities. According to various tariff provisions, a customer may complete parts of work in the installation of new or replacement facilities upon approval by the utility. (Section 10, Tariff PSC Mo. #2) KCPL is responsible for its

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facilities throughout its system in terms of reliability and liability in the event of interruption of service or an accident and its tariffs clearly give KCPL the authority to approve (and implicitly, to not approve) installation work by a customer. In this instance, KCPL does not approve. This Commission will not seek to step into the utility's shoes to prescribe construction methods, choose engineering designs or select the firms with whom it contracts. The Commission will not order the utility to accommodate Boulevard's request.

6. Boulevard requests an order that protects Boulevard from having to pay any sum of money or convey any property that would in any way benefit KCPL or its ratepayers. No part of its resolution of the instant dispute benefits inappropriately KCPL, its ratepayers or the KCPL system as a whole. Boulevard's request is denied.

7. Boulevard demands that KCPL be ordered to submit a new tariff provision that directly relates to the issues associated with this case and to include within that provision reasonable allocations of costs payable by the customer or third-party. A tariff provision directly on point may assist in the resolution of this kind of matter. The Commission shall order its Staff to evaluate whether new tariff provisions for such circumstances should be ordered for all Commission jurisdictional electric utilities in the state. If the Staff finds that such a rule or tariff would be appropriate, Staff, at its own discretion, may file a complaint, a motion for such relief or a rulemaking. The Commission will not order KCPL to make such a unilateral filing in this case.

8. Boulevard finally requests an order requiring KCPL to submit an "objective formula for calculating line extension and relocation costs and revenue credits." As in item seven above, the Commission will order its Staff to evaluate the merits of such a request and that, if the Staff, in its discretion, finds the need for such a formula or calculation method, it may file a complaint, a motion for such relief or a rulemaking. The Commission will not order KCPL in this case to make such a filing.

CONCLUSIONS OF LAW

1. Pursuant to §386.390, RSMo 2005, this Complaint is properly before this Commission for determination on the merits.

2. Combined with KCPL's tariffs and practices and the fact that the City declared the area including 26th Street to be blighted, approved the General Development Plan, required the widening of the road, and, in turn, required the relocation of the utility poles at the intersection of 26th Street and Southwest Boulevard, KCPL shall be required to pay for the relocation of those facilities if mandated by the City. This shall include all relocations between the alleyway and Southwest Boulevard, and may include the entirety of the 26th Street relocations, if KCPL determines that having the poles on the same side of the street is the safest and most reliable location to serve its customers and the general public.

3. In order for the City to exercise its ability to require KCPL to relocate facilities at KCPL's expense, the City shall direct KCPL in an unambiguous statement that it is requiring KCPL to relocate specific lines on 26th Street. In addition, the City shall provide KCPL the traffic studies and plans showing the planned street renovations.

4. The General Development Plan and later City Ordinances and Resolutions are vague and make no specific demand to KCPL regarding KCPL's facilities on Bellevue. Therefore, KCPL is not ordered to pay for any removal, relocation or burial of the lines on Bellevue.

5. KCPL has followed its tariff provisions in application of its line extension policies and has no further obligation with respect to line extensions, except that the Parties agreed to "save" \$20,000 credit for future work.

IT IS ORDERED THAT:

1. KCPL is not required to pay for the relocation or burial of power lines on Bellevue Avenue.

2. When the City requires KCPL to relocate its facilities on 26th Street according to its usual practice, KCPL must, within a reasonable time comply with the City's request at KCPL's expense.

3. Boulevard may not perform any of the work on KCPL's facilities unless authorized and approved by KCPL, pursuant to its tariffs.

4. Boulevard may, at its own expense, seek a letter ruling from the IRS that no such tax is owed. If Boulevard receives such a ruling, Kansas City Power & Light Company will promptly refund the previously paid CIAC tax.

5. The Commission Staff shall evaluate whether new tariff provisions for circumstances such as those presented in this case should be ordered for all Commission jurisdictional electric utilities in the state and duly report its findings to the Commission.

6. The Commission Staff shall evaluate whether companies shall provide, in their tariffs, objective formula for calculating line extension and relocation costs and revenue credits and duly report its findings to the Commission.

7. All other requests for relief are denied.

8. This order shall become effective on April 16, 2006.

Clayton, C., concurs;
Gaw and Appling, CC., concur with
opinion(s) to follow;
Davis, Chm., Murray, C., dissents;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I concur in the conclusions of the majority in this case. I write this concurrence, however, to clarify my analysis of the facts and law.

Electric lines may be located along the right of ways of municipal streets if the city (or county as the case may be) has granted the authority under a franchise agreement with the utility. Common law is well established in Missouri that generally when a street or roadway is changed in such a way that the removal of an existing transmission or distribution line is necessary, the cost of that removal is borne by the utility. This is because the utility's privilege to use the city's right of way is entirely derived from the initial granting of the franchise and is conditioned

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on the primary right of the city to control and operate its streets for the public to which the utility's rights are subservient.

This right of the city is superior, however, only so long as the primary purpose in the alteration to the streets requiring the removal of the lines is public in nature. If not, the general rule no longer applies and the utility must be compensated for the removal of the line. *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo.App. E.D. 1989); *City of Bridgeton v. Missouri-American Water Co.*, Case No. ED 86292 (Mo.App. E.D. March 28, 2006).

In this case there is no dispute that the lines on 26th Street and on Bellevue Avenue are in the City's right-of-way. The question then that first must be answered is whether the primary purpose requiring the removal of any lines is public or proprietary. An argument could be made that the analysis for this question on 26th Street is different than on Bellevue Avenue. The question of the public versus private purpose could be made for each, separately determining the particular purpose of the alteration. Ignoring the nature of the development project itself, under such an analysis the arguments in favor of a public purpose appear stronger on 26th Street than on Bellevue Avenue. The evidence is convincing that the need for the widening of the roadway on 26th Street benefits Boulevard Brewing but also has substantial benefit to the health and safety of travelers on 26th Street due to increased traffic – not just from the development at the Boulevard Brewing site - but from other public improvement projects also in the general vicinity¹. However, the closure of Bellevue Avenue appears when examined in isolation, to have significant private benefit to Boulevard Brewing – allowing its use by the company as a private road and parking facility. This Commissioner believes that Missouri precedent does not provide for such a separate study of the purpose of Bellevue Avenue and 26th Street.

In *Union Electric Co. v. Land Clearance For Redevelopment Authority of City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977), the Court, in facts very similar to those in the case at hand, found that the lynchpin of the determination of the primary purpose was that the City had utilized the statutory powers granted it under Missouri law to engage in an urban redevelopment project having declared the area blighted. The Court did not take a piecemeal approach to portions of the project but instead looked at the project's overall purpose. The Court said:

This relocation of facilities required of Union Electric was necessitated by an urban renewal project: the DeSoto Carr Urban Renewal Project said by Union Electric's petition to include the Convention Plaza and a privately owned and operated hotel as a part of St. Louis' new downtown Convention Center to be developed under authority of the Land Clearance for Redevelopment Authority Law. The primary purpose of the project, the redevelopment or renewal of what is implicitly a blighted area of the city, has been declared legislatively to be a public purpose. The vacation of this block of the city thoroughfare and the requirement that Union Electric remove its facili-

¹ Vol. 1, Tr. 85, line 23 – Tr. 89, line 13.

ties therefrom to make the thoroughfare available for use as part of this project were acts of the City and the Authority in the exercise of a governmental rather than a proprietary function. [555 S.W.2d at 33.]

In this case, Kansas City has used a similar action declaring the project area blighted pursuant to Missouri law. Both the widening of 26th Street and the vacating of Belleview Avenue are the result of the redevelopment of an area Kansas City declared to be blighted. Under the reasoning in the Union Electric case no separate analysis of Belleview Avenue and 26th Street appears appropriate. The Union Electric case establishes that the statutorily authorized redevelopment project is primarily for a public purpose, and, therefore, the street changes are primarily public in nature as well.

While the analysis of 26th Street concludes with this finding (other than the majority's determination as to the portion of the street east of the alley with which I agree), further discussion is warranted on Belleview Avenue.

The record does not convince this Commissioner that the City has ordered the removal of the electric lines along this vacated street. Kansas City, in fact, specifically reserved the utility easements in its vacation order. If the order to remove the lines would have been issued, KCPL would be required to move the lines and to pay for their removal. However, KCPL's responsibility to Kansas City stops there. The utility is under no obligation under common law to comply with any requirement to bury the lines as has been suggested by the Complainants. As explained in the *Union Electric Co. v. City of Crestwood*, 499 S. W.2d 480 (Mo. 1973), it is the utility's responsibility under the supervision of the Public Service Commission, not the City's, to determine the method of delivering electricity safely and reliably unless the City reserved such powers unto itself in the original franchise. The Court stated:

Section 71.520 relates to the granting of utility franchises by municipalities. It provides that privileges granted in such ordinances shall be subject to the rules, regulations and conditions expressed in the ordinance. In other words, a city may say to a utility that if you want a franchise in this city, we will grant it on certain specified conditions, and the parties then agree thereon. Thus, in *Missouri Valley Realty Co. v. Cupples Station Light, Heat and Power Co.*, 199 S.W. 151 (Mo. 1917); *Frolichstein v. Cupples Station Light, Heat and Power Co.*, 201 Mo.App. 162, 210 S.W. 90 (1919) and *State ex rel. McAllister v. Cupples Station Light, Heat & Power Co.*, 283 Mo. 115, 223 S.W. 75 (Mo. banc 1920), all cited and relied on by Crestwood, the ordinance involved was a franchise ordinance passed by the City of St. Louis and accepted by the utility company. It provided for underground cables in certain locations and this court upheld the validity of that ordinance. In the case now under consideration, however, we do not deal with that kind of situation. Instead, UE holds a previously granted franchise and Crestwood now seeks to eliminate rights granted therein

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and to require all subsequent construction, even of high voltage lines carrying power through the city on private right-of-way for use by other communities, be placed underground. Section 71.520 is not applicable and does not authorize Ordinance No. 1119. [Id. at 484.]

In the case at hand no such reservation was made by Kansas City in the original franchise to KCPL. Thus, there is no requirement that can now be made on KCPL barring acquiescence by the utility. The utility has in its tariff, however, consented to the orders of Kansas City regarding burial of electric lines. This consent is conditioned upon Kansas City paying for the burial of the lines.

Based on the foregoing, KCPL is responsible for the removal of lines along 26th Street. It is not responsible for the removal of lines on Belleview Avenue since no removal has been ordered. If Kansas City wishes to have the lines along Belleview Avenue removed and placed underground, then KCPL must comply but only if the costs are paid by Kansas City pursuant to the KCPL tariffs. For the foregoing reasons, I concur.

CONCURRING OPINION OF COMMISSIONER LIN APPLING

I support this order because it achieves a reasonable result, consistent with applicable laws, tariffs and the record evidence available to the Commission. I concur, in particular, with the majority's opinion that more assertive public leadership could have prevented this complaint from even reaching our door.

It long has been KCPL's policy to pay for government-mandated facility relocations, when there is clear and unambiguous direction. KCPL testified that the City of Kansas City normally provides this direction but that, in this case, it did not.

Without full disclosure, the utility swings in limbo. Without full disclosure, the Commission cannot determine the public interest. This is a critically important factor because, when all is said and done, it is KCPL's ratepayers who likely will share the burden of these improvements. It is in no party's interest to leave such a void in the record.

I applaud those who are committed to redeveloping urban core areas, but I am concerned that the Commission will be asked to resolve more complaints of this nature ... complaints that, with more assertive local leadership, could be resolved without diverting time and money to regulatory procedures.

For these reasons, I respectfully concur.

**The Office of the Public Counsel, Complainant, v. Southern
Missouri Gas Company, L.P., Respondent.**

Case No. GC-2006-0180
Decided April 11, 2006

Gas §2. The Commission approved the Stipulation and Agreement that helped resolve concerns about Southern Missouri Gas' hedging practices; the parties agreed to establish a former process for Southern Missouri Gas to annually provide the Commission, Staff, and Public Counsel with a formal plan for physical purchases and hedging for its natural gas supply.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement submitted by the parties.

On October 21, 2005, the Office of the Public Counsel filed a complaint against Southern Missouri Gas Company, L.P. Public Counsel alleged that Southern Missouri Gas had failed to comply with the Commission's rule requiring the company to "undertake diversified natural gas purchasing activities as part of a prudent effort to mitigate upward natural gas volatility and secure adequate natural gas supplies for their customers."¹

On March 13, 2006, Public Counsel, the Staff of the Missouri Public Service Commission, and Southern Missouri Gas filed a unanimous stipulation and agreement that resolves all disputes between the parties regarding Public Counsel's complaint. A copy of the stipulation and agreement is attached to this order as Attachment 1. Staff filed suggestions in support of the stipulation and agreement on March 17.

To resolve concerns about Southern Missouri Gas' hedging practices, the parties agreed to establish a formal process for Southern Missouri Gas to annually provide the Commission, Staff, and Public Counsel with a formal plan for physical purchases and hedging for its natural gas supply. The first gas supply plan is to be submitted by April 1, 2006, with updates to be filed on July 1 and October 1, 2006. Southern Missouri Gas will prepare new plans each subsequent year until the effective date for new rates approved in the company's next general rate case, or until the signatory parties unanimously agree that additional filings are no longer needed.

The stipulation and agreement provides that Southern Missouri Gas will remain responsible for its decisions regarding gas purchasing and hedging. The stipulation and agreement also states that Southern Missouri Gas will remain subject to prudence reviews as part of the annual PGA/ACA process, and any rate case or complaint proceedings. Any review of Southern Missouri Gas' gas purchasing and hedging plans by Staff and Public Counsel are not to be construed as pre-approval of those plans.

¹ 4 CSR 240-40.018. (The quotation is from the purpose clause of the rule)

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In addition to the new planning and reporting requirements, the stipulation and agreement also requires Southern Missouri Gas to permit customers to enter into payment arrangements that would recover any arrearages, above the minimum payment requirement under the Commission's Cold Weather Rule, over an 18-month period rather than the 12-month period required by that regulation. The stipulation and agreement also requires Southern Missouri Gas to initiate a rebate program to encourage the installation of new energy efficient natural gas furnaces and natural gas water heaters in the company's service area.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.² Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the stipulation and agreement.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on March 13, 2006, is approved as a resolution of all issues in this case (See Attachment 1).
2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement.
3. Southern Missouri Gas Company, L.P. shall file tariff sheets no later than April 21, 2006, to implement the new and expanded rebate programs described in the stipulation and agreement. The tariff sheets are to be filed in this case.
4. This order shall become effective on April 21, 2006.

Davis, Chm., Murray and Appling, CC., concur
Gaw and Clayton, CC., dissent, dissent to follow

Woodruff, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

² Section 536.060, RSMo Supp. 2005.

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

**DISSENTING OPINION OF COMMISSIONERS
ROBERT M. CLAYTON III AND STEVE GAW**

These Commissioners respectfully dissent from the majority's Order Approving Unanimous Stipulation and Agreement. By approving the Stipulation and Agreement, this Commission fails to address Southern Missouri Gas Company's (SMGC) lack of prudent preparation for the gas needs of its customers for the 2005-2006 winter heating period. The Commission has lost an opportunity to send a clear message that it expects Missouri gas companies to protect consumers from extreme price fluctuations by utilizing sound supply preparations for the winter heating season. The Stipulation in this case fails to identify damage to consumers and requires the company to take action it was already required to do.

Due to a variety of reasons, volatility in the price of natural gas set the stage for a potentially disastrous winter for consumers in 2005-2006. Consumers avoided an unprecedented financial burden from home heating costs because of a warmer-than-average winter season. Over the objections of Commissioner Gaw, SMGC's PGA went into effect in October 2005. Once approved, the Commission lost the ability to review or amend the adjustment until the next ACA prudence review which does not occur until December 2006 – the beginning of the next winter heating season.

Normally, PGA adjustments are approved as a matter of course without scrutiny beyond Staff's recommendation. The magnitude of the increase demanded the Commission to hold a hearing to learn of the Company's policies and efforts at price mitigation for consumers. At the hearing, the Commission learned that SMGC failed to implement any hedging practices for the 2005-2006 winter heating period contrary to "Natural Gas Price Volatility Mitigation" rule. 4 CSR 240-40.01. Staff's recommendation in the PGA case and in this Complaint case, withheld determination of the prudence of SMGC's gas purchasing practices until the ACA review in December 2006.

After the approval of the PGA in October 2005, the OPC filed a complaint alleging a continuing violation of 4 CSR 240-40.018 that requires LDC's to:

"As a part of a prudent planning effort to secure adequate natural gas supplies for their customers, natural gas utilities should structure their portfolios of contracts with various supply and pricing provisions in an effort to mitigate upward natural gas spikes, and provide a level of stability of delivered natural gas prices."

In its Complaint, the OPC stated that "SMG established a strategy that was entirely a gamble based on a hope that market prices would decline this fall and winter." Complaint at p.3. The OPC requests the Commission to find SMGC in violation of this rule and to impose appropriate penalties. The filing occurred as approaching colder temperatures encouraged public outcry for significantly increasing prices.

The Commission now has before it a Stipulation supposedly resolving all the issues in the Complaint, which primarily focuses on a newly adopted hedging and gas purchasing strategy for the Company. The parties acknowledge that the Company had no strategy nor did it take any action in preparation for the winter. The Commission should be aware of what the financial impact that inaction inflicted on

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customers. That information is a critical piece needed to ascertain whether or not SMGC's customers were harmed by the utility's failure to hedge. A complaint case that fails to determine if harm resulted from a utility's acts or omissions has little worth, especially when the complaining party requests appropriate penalties without presenting any supportive evidence.

The negotiation between the SMGC, the OPC and the Staff of the Commission resulted in a proposed settlement which produces insignificant consequences for SMGC's failure to protect its customers by utilizing hedging practices. The resulting Order Approving Unanimous Stipulation and Agreement is only prospective in nature. It simply requires SMGC to begin to do what has always been required of it by administrative rule.

The PSC Rule in question, 4 CSR 240-40-018, sets a low bar for LDCs in their gas purchasing practices. The Company failed to traverse that bar. The settlement sends the message that any LDC may take the same route as the Company without the threat of penalty. Such a message fails to address a gas utility's obligations to mitigate gas volatility. The majority's interpretation leaves Missouri's natural gas consumers with inadequate protections and that is unacceptable.

For these reasons, we respectfully dissent.

**The Staff of the Missouri Public Service Commission, Com-
plainant, v. Missouri Utilities Company, Respondent.**

Case No. WC-2006-0029

Decided April 13, 2006

Water §10. Section 393.145.1 RSMo Supp. 2005 provides that if the Commission "determines that any sewer or water corporation that regularly provides service to eight thousand or fewer customer connections is unable or unwilling to provide safe and adequate service, has been actually or effectively abandoned by its owners...the Commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of the receiver.

The Commission directed its Staff to seek appointment of a receiver after it found that a water and sewer company had been effectively abandoned by its owners, where a lack of available capital and poor management practices made it unlikely that the company could continue to provide service to its customers.

The Commission directed its Staff to seek appointment of a receiver after it found that a water and sewer company was unable or unwilling to provide safe and adequate service because of its desperate financial situation.

APPEARANCES

Keith R. Krueger, Deputy General Counsel; *Mary Weston*, Assistant General Counsel P.O. Box 360, Jefferson City, Missouri 65102
For the Staff of the Missouri Public Service Commission

REGULATORY LAW JUDGE:

Morris L. Woodruff

REPORT AND ORDER**Summary**

This order directs the Commission's Staff to file a petition in circuit court seeking the appointment of a receiver to take charge of the water and sewer system of Missouri Utilities Company. The order also appoints an interim receiver to immediately take charge of that system while Staff's action is pending in the circuit court.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

Procedural History

On July 21, 2005, the Staff of the Commission filed a complaint against Missouri Utilities Company. Staff's complaint alleged that Missouri Utilities is unable or unwilling to provide safe and adequate service to its water and sewer customers. Staff requests authority to pursue an action in circuit court to have a receiver appointed to take charge of Missouri Utilities. Staff further alleged that because of the company's failures, Missouri Utilities' customers are in imminent danger of losing their water and sewer service. As a result, Staff requested that the Commission appoint an interim receiver to immediately take charge of Missouri Utilities while the action to appoint a receiver is pending in circuit court. Staff also asked that the Commission consider its complaint in an expedited manner.

On July 22, the Commission issued a Notice of Complaint and Order Directing Response and Scheduling Evidentiary Hearing, which was served on Missouri Utilities by certified mail on July 25. The Commission ordered Missouri Utilities to file an answer to Staff's complaint no later than August 5. The Commission also scheduled an evidentiary hearing to take place on August 15.

Missouri Utilities did not file an answer. A hearing was convened on August 15. Missouri Utilities did not appear for the hearing. Staff presented testimony in support of its complaint.

The Service Provided by Missouri Utilities

Staff presented testimony by Dale Johansen, Manager of the Commission's Water and Sewer Department. Johansen established that Missouri Utilities is a public utility providing water and sewer service to a subdivision, located near Sedalia in Pettis County, Missouri. The company provides sewer service to approximately 135 customers and water service to approximately 160 customers. Missouri Utilities has owned this water and sewer system since 1993. William P. (Pat) Mitchell is the owner of Missouri Utilities, and he is the President, Secretary and only Director of that company.¹ In addition, Mitchell is the only employee of Missouri Utilities.

¹ Exhibit 2.

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Missouri Utilities has had problems in delivering service to its customers at least since July 2003. At that time, Mitchell sent a letter to the company's customers complaining that the company was facing major costs to maintain operation of the water and sewer systems and that the company did not have the money needed to make those repairs. Mitchell also indicated that he would not be willing to personally guarantee any loans made to the company. Mitchell suggested at that time that the customers should purchase the water and sewer system and operate it as a co-op style company.²

Missouri Utilities continued to operate the water and sewer system, but on April 1, 2005, Mitchell sent another letter to his customers, again complaining that the company did not have enough money to make needed repairs to the water well. The letter states "the well could quit any day," and warns, in large bold letters, **"YOU MAY NOT HAVE ANY WATER SOON IF YOU DO NOT DO SOMETHING!"** Mitchell again urges his customers to take over and operate the system, and indicates that he will give the system to the customers if they will operate it.³

After he became aware of the April 1 letter, Dale Johansen, on behalf of the Commission's Staff, contacted Mitchell and told him that he would be required to live up to his responsibilities as the owner and president of Missouri Utilities. At that time, Mitchell told Johansen that he wanted to get out of the utility business.

On July 15, 2005, the water pump serving Missouri Utilities' customers did indeed fail. Mitchell and Missouri Utilities took no action to deal with the failure of the pump. After several days without water, the customers pooled their resources and purchased a new pump for the water well at a cost of \$9,648.⁴ No arrangements have been made to reimburse the customers for this expenditure, although they hope to recoup their costs if the system is sold.

The water and sewer system continued to operate thanks to the actions of the customers. One customer in particular, Bob Gautreaux, attempted to maintain the new water pump, but he did not have the expertise required to properly operate and maintain the entire water and sewer system. To the best of Staff's knowledge, neither Mitchell, nor anyone else, is currently collecting the environmental samples required by the Department of Natural Resources.

Staff's complaint asked the Commission to appoint an interim receiver to take charge of the water and sewer system while Staff sought the appointment of a receiver in circuit court. Johansen testified that Staff had not yet found a qualified receiver willing to serve in that position. After months of searching, Staff filed a pleading on April 7, 2006, indicating that it had finally identified a person qualified and willing to serve as interim receiver. Staff recommends that Robert K. Meyer of Sedalia, Missouri, be appointed as interim receiver. Staff indicates that Meyer is a responsible person knowledgeable in the operation of utilities and therefore meets the statutory requirements for an interim receiver.

²Exhibit 3.

³Exhibit 4.

⁴Exhibit 5.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Missouri Utilities is a public utility as defined by Section 386.020(42), RSMo 2000. Furthermore, Missouri Utilities is a sewer corporation and a water corporation, as those terms are defined in Subsections 386.020(48) and (58), RSMo 2000. As such, Missouri Utilities is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Subsection 393.145.1, RSMo Supp. 2005, provides as follows:

If, after hearing, the commission determines that any sewer or water corporation that regularly provides service to eight thousand or fewer customer connections is unable or unwilling to provide safe and adequate service, has been actually or effectively abandoned by its owners, or has defaulted on a bond, note or loan issued or guaranteed by any department, office, commission, board, authority or other unit of state government, the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver. The venue in such cases shall, at the option of the commission, be in the circuit court of Cole County or in the circuit court of the county in which the utility company has its principal place of business.

Furthermore, Subsection 393.145.2, RSMo Supp. 2005, provides as follows:

If the Commission orders its general counsel to petition the circuit court for the appointment of a receiver under subsection 1 of this section, it may in the same order appoint an interim receiver for the sewer or water corporation. The interim receiver shall have the authority generally granted to a receiver under subsection 6 of this section, except that the commission cannot authorize the interim receiver to transfer by sale or liquidate the assets of the utility. The interim receiver shall be compensated in an amount to be determined by the commission. The interim receiver shall serve until a judgment on a petition for writ of review of the commission's order, if any, is final and unappealable, and until the circuit court thereafter determines under subsection 5 of this section whether to grant the commission's petition for appointment of receiver.

In addition, Subsection 393.145.3, RSMo Supp. 2005, provides as follows:

When the commission files its petition for appointment of receiver in the circuit court, it shall attach to its petition an official copy of its determination under subsection 1 of this section. The commission shall not file such action until its determination under subsection 1 of this section is final and unappealable.

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Subsection 393.145.7, RSMo Supp. 2005, provides as follows:

Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interests of its customers, be returned to the owners. However, if the commission or other interested party petitions and the court determines, after hearing, that control of and responsibility for the utility should not, in the best interests of its customers, be returned to the owners the court shall direct the receiver to transfer by sale or liquidate the assets of the utility in the manner provided by law.

Subsection 393.145.5, RSMo Supp. 2005, requires that a receiver appointed under that section be "a responsible person, partnership, or corporation knowledgeable in the operation of utilities."

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions. The evidence presented by Staff clearly demonstrated that Mitchell and Missouri Utilities have effectively abandoned that company's water and sewer systems. The customers of this public utility had to raise the money needed to make vital repairs to the company's water system to restore their service when the company and its owner refused to make those repairs. That is a situation that should never have happened, and must not be allowed to happen again. As a result, there is a clear and immediate need for the appointment of a receiver to take charge of this company to ensure that its customers are able to receive safe and adequate water and sewer service.

There is also a need for the appointment of an interim receiver to take immediate control of the operation of this water and sewer system. The person identified and recommended by Staff to serve as interim receiver is a responsible person knowledgeable in the operation of utilities, and will be appointed as interim receiver.

It is also clear that the best interests of the customers dictate that control of the water and sewer system should not be returned to Mitchell and Missouri Utilities. Therefore, Staff will be authorized to seek a finding from the circuit court that control and responsibility of Missouri Utilities should not be returned to its current owner. Instead, Staff will be directed to seek an order from the circuit court directing the receiver to proceed to transfer by sale or liquidate the assets of the company.

IT IS ORDERED THAT:

1. The General Counsel of the Commission is directed to petition the Circuit Court of Cole County for an order attaching the assets of Missouri Utilities Company, and placing that company under the control and responsibility of a receiver.
2. The General Counsel of the Commission is directed to seek a finding from the Circuit Court of Cole County that control and responsibility for Missouri Utilities Company should not, in the best interest of the company's customers, be returned to the owners of the company and that the receiver should be directed to transfer by sale or liquidate the assets of the company in the manner provided by law.

3. Robert K. Meyer is appointed as interim receiver for Missouri Utilities Company.
4. This report and order shall become effective on April 23, 2006.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC.,
concur and certify compliance with the provisions
of Section 536.080, RSMo 2000.

In the Matter of the Joint Application of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P (“Aquila”), The Empire District Gas Company (“EDG”), and The Empire District Electric Company (“EDE”) for an order authorizing the sale, transfer, and assignment of certain assets and liabilities from Aquila to EDG and in connection therewith, certain other related transactions.

*Case No. GO-2006-0205
Decided April 18, 2006*

Gas §3. The Empire District Gas Company was granted a certificate of convenience and necessity to provide natural gas service as a gas corporation and public utility, subject to the jurisdiction of the Commission, in the service areas now served by Aquila, Inc. The Commission found that granting the certificate would not be detrimental to the public interest.

Gas §6. Aquila was authorized to sell, transfer and assign to The Empire District Gas Company, and The Empire District Electric Company was authorized to acquire certain assets and liabilities of Aquila's Missouri jurisdictional gas utility operations as described in the Purchase Agreement. The Commission found that granting the transfer would not be detrimental to the public interest.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT
AND GRANTING A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY**

On November 8, 2005, Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P and both The Empire District Gas Company (EDG) and The Empire District Electric Company (EDE) filed a joint application seeking authorization to sell, transfer and assign certain assets and liabilities from Aquila to EDG. EDG is a Kansas corporation created for the purpose of acquiring and operating certain assets consisting of Aquila's Missouri jurisdictional natural gas utility operations. It is a wholly owned subsidiary of EDE. Essentially, Aquila and the Empire Companies seek to transfer all of Aquila's Missouri jurisdictional gas operations to EDG. On November 10, the Commission issued an Order and Notice, allowing interested persons an opportunity to intervene. The following companies were granted intervention: Cornerstone Energy, Inc.; Crane Plumbing, L.L.C.; and Pittsburgh Corning Corporation.

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On February 28, Aquila, EDG, EDE, the Staff of the Commission, Crane Plumbing, Cornerstone Energy, Pittsburgh-Corning and the Office of the Public Counsel filed a Unanimous Stipulation and Agreement. With the approval of the Stipulation and Agreement, the parties request that the Commission:

- (a) authorize Aquila to sell, transfer and assign to EDG, and authorize EDG to acquire, certain assets and liabilities of Aquila's Missouri jurisdictional gas utility operations as described in the Purchase Agreement;
- (b) direct Aquila, EDE and EDG to comply with the terms and conditions contained in the Stipulation and Agreement and authorize them to comply with the Purchase Agreement;
- (c) authorize Aquila, EDE and EDG to enter into, execute and perform all transactions in accordance with the terms of all other documents not inconsistent with this Stipulation which may be reasonably necessary and incidental to the performance of the transaction and grant Aquila, EDE and EDG such other relief as may be necessary to consummate the sale, transfer and assignment of the assets and related transactions;
- (d) grant EDG a certificate or certificates of convenience and necessity authorizing EDG to provide natural gas service as a gas corporation and public utility, subject to the jurisdiction of the Commission, in the service areas presently served by Aquila through the Business (as defined in the Joint Application), and, in connection therewith, waive the requirements of 4 CSR 240-3.205;
- (e) authorize EDG to provide natural gas service in the areas served by such gas utility operations in accordance with the rules, regulations, rates and tariffs of Aquila as are on file with and approved by the Commission on the effective date of the closing of the transaction, including the tariff sheets reflecting the existing base rates and purchase gas adjustment of Aquila, and authorize EDG to adopt said tariff sheets and to operate under the same as they may be changed from time to time as provided by law;
- (f) authorize Aquila to terminate its responsibility as a gas corporation in Missouri at closing; and
- (g) authorize EDG to use the current approved depreciation rates for Missouri gas properties acquired from Aquila as shown on the list attached to the Stipulation and Agreement, as Appendix 1, until the same may be change from time to time as provided by law.

On March 13, the Staff of the Commission filed a Memorandum in support of the Stipulation and Agreement. Staff points out several areas of concern that, through provisions in the Stipulation and Agreement, are dealt with satisfactorily. Those areas include; gas procurement, tariffs, employee benefits, the Chillicothe Manufactured Gas Plant site, regulatory stability through a rate moratorium, customer notice and accounting for acquisition adjustments. Staff concludes by stating that the proposed transfer is not detrimental to the public interest.

On-the-Record Presentation

Prior to approving the agreement, the Commission posed on-the-record questions to the parties. The areas covered included: the effect the transfer would have on the credit ratings of Aquila, as well as Empire; the benefit to the customers of both companies; and Empire's ability to effectively procure natural gas, including their hedging plan and the experience of the personnel who will be responsible for procurement.

Discussion

Section 393.190, RSMo 2000, requires approval by the Commission before a regulated utility disposes of all or any part of its system. According to the Stipulation and Agreement, Aquila plans to transfer all of its assets necessary to engage in the natural gas business. The Commission may withhold its approval of a transfer of assets if it is shown that the transfer would be detrimental to the public interest.¹ After considering the pleadings and having posed on-the-record questions to the parties, the Commission finds that it has not been shown that the transfer will be detrimental to the public interest and will approve the Stipulation and Agreement. The Commission further finds that it is necessary and convenient for the public service to grant EDG a certificate of convenience and necessity to provide natural gas service in service area now served by Aquila.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed by the parties in this matter is approved.
2. Aquila, Inc. is authorized to sell, transfer and assign to The Empire District Gas company, and The Empire District Gas Company is authorized to acquire, certain assets and liabilities of Aquila's Missouri jurisdictional gas utility operations as described in the Purchase Agreement.
3. Aquila, Inc., The Empire District Gas Company and The Empire District Electric Company shall comply with the terms and conditions contained in the Stipulation and Agreement.
4. Aquila, Inc., The Empire District Gas Company and The Empire District Electric Company are authorized to comply with the Purchase Agreement.
5. Aquila, Inc., The Empire District Gas Company and The Empire District Electric Company are authorized to enter into, execute and perform in accordance with the terms of all other documents, not inconsistent with the Stipulation and Agreement, which may be reasonable necessary and incidental to the performance of the transaction.

¹ *State of Missouri ex rel. Fee Fee Trunk Sewer, Inc. v Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980).

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6. The Empire District Gas Company is granted a certificate of convenience and necessity to provide natural gas service as a gas corporation and public utility, subject to the jurisdiction of the Commission, in the service areas now served by Aquila, Inc.

7. The Empire District Gas Company is authorized to provide natural gas service in the areas currently served by Aquila, Inc.'s gas utility operations in accordance with the rules, regulations, rates and tariffs of Aquila, Inc., as are on file with and approved by the Commission on the effective date of the closing of the transaction, including the tariff sheets reflecting the existing base rates and purchase gas adjustment of Aquila, Inc.

8. The Empire District Gas Company is authorized to adopt the tariff sheets discussed in ordered paragraph 7 and to operate under the same as they may be changed from time to time as provided by law.

9. The Empire District Gas Company is authorized to pledge the assets obtained through this transaction to finance the purchase.

10. Aquila, Inc. is authorized to terminate its responsibility as a gas corporation in Missouri at closing.

11. The Empire District Gas Company is authorized to use the current approved depreciation rates for Missouri gas properties acquired from Aquila, Inc. as shown in Appendix 1, attached to the Stipulation and Agreement, until the same may be changed from time to time as provided by law.

12. This order shall become effective on May 1, 2006.

13. This case may be closed on May 2, 2006.

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., absent.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri Near the Town of Peculiar.*

*Case No. EA-2006-0309
Decided April 20, 2006*

Gas §3. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.

* See page 400 for another order in this case.

Certificates §34. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri because the Commission has the authority to consider land use issues for power plants proposed for first-class non-charter counties, such as Cass County. Also, the Commission more properly hears other issues (such as identifying locations of existing gas pipelines that could deliver sufficient fuel at acceptable pressure) as well as zoning. Also, the Western Districts opinion and the Circuit Court of Cass County's order also come into play as factors.

Certificates §43. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.

ORDER DENYING MOTIONS TO DISMISS

On January 25, 2006, Aquila, Inc., applied to the Missouri Public Service Commission for a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri. StopAquila.org and Cass County filed motions to dismiss.

StopAquila.org

StopAquila.org argues that the Commission does not have jurisdiction to rule on Aquila's petition because Aquila does not have the required consent of proper municipal authorities required by Section 393.170.2, RSMo. Further, StopAquila.org argues that Cass County has the power to regulate location of buildings, and further argues that zoning regulations supersede other laws.¹ StopAquila.org cites several cases for the proposition that a utility must get permission from the county and this Commission to build a power plant.

In addition, StopAquila.org argues that Sections 393.170.1 and .2 require a utility to get permission before it builds a power plant. And, before the Commission can grant permission under Section 393.170.2, the applicant must first show the Commission that it has received the required consent of the proper municipal authorities. Quite simply, StopAquila.org contends that the Commission cannot approve a power plant after the fact.

Responses of Staff and Aquila

Staff and Aquila argue that the required local government consent is the franchise that Aquila already has, not the zoning authority that Aquila does not have. Also, they differentiate between a line certificate, which Section 393.170.1 addresses, and an area certificate, which Section 393.170.2 addresses. They submit that Aquila requests a line certificate, and that Section 393.170.1 does not require Aquila to have municipal consent for a line certificate.²

Furthermore, Aquila and Staff point to the *Aquila* opinion's statement that Aquila qualifies for an exemption from Section 64.235 RSMo³, and argue that the exemption from zoning authority would be meaningless if Aquila then had to get zoning authority to qualify for the exemption.

¹ Sections 64.255, .285 RSMo (2000)(all statutory cites are to Revised Statutes of Missouri 2000 unless otherwise noted).

² *StopAquila.org v. Aquila*, 180 S.W.3d 24, 35 (Mo. App. 2005).

³ *Id.* at 32.

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Discussion

Commission Rule 4 CSR 240-2.117 allows the Commission to grant motions for summary determination if the record shows that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that it is in the public interest. Upon review of the pleadings and after hearing the arguments of the parties, the Commission concludes that it should deny the motions to dismiss.⁴

StopAquila argues that Aquila must first obtain Cass County zoning approval for the facilities at issue here because, under Section 393.170.2, Aquila is required to show it has received “the required consent of the proper municipal authorities.” However, Section 393.170 provides two kinds of certificate authority – subsection 1, authority for a public utility to construct an electric plant, and subsection 2, authority to serve a territory.⁵

Aquila’s application is a request for a certificate of convenience and necessity under Section 393.170.1.⁶ Section 393.170.2, which contains the local consent requirement and which StopAquila urges the Commission to apply here, is simply inapplicable to this case. Sections 393.170.1 and 393.170.2 are not interchangeable.⁷ Subsection 1 “sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate. . . . The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority.”⁸ Simply put, the local consent requirement in subsection 2 applies only to applications for area certificates, not to applications under subsection 1, as is the case here.

Further, even if Aquila were obligated to make such a showing, Aquila received the type of local consent contemplated by subsection 2 when, in 1917, and pursuant to what later became Section 229.100, the Cass County Court granted Aquila’s predecessor the right to utilize county rights of way.⁹ “Utility franchises are

⁴ Commission Rule 4 CSR 240-2.116 is the Commission’s rule on dismissal. That rule allows dismissal when a party dismisses its petition or complaint, when the case languishes due to inactivity, when a party fails to obey a Commission order, or for good cause. Commission Rule 4 CSR 240-2.117 is the Commission’s rule on Summary Disposition, and is a more appropriate rule to use to decide the motions to dismiss, because the motions ask for relief as a matter of law.

⁵ *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960); *Aquila*, 180 S.W.3d at 33.

⁶ *Aquila*, 180 S.W.3d at 35.

⁷ *State ex rel. Union Elec. Co. v. Public Service Comm’n of Mo.*, 770 S.W.2d 283, 285 (Mo.App. 1989); *Aquila*, 180 S.W.3d at 33, 35.

⁸ *Union Elec. Co.*, 770 S.W.2d at 285.

⁹ The 1917 franchise was presented to the Commission as part of the application in Case No. 9470 pursuant to what is now Section 393.170.2, resulting in the Commission’s issuance of the 1938 area certificate under which Aquila now serves most of Cass County, as well as several other counties. See also Appendix 6 to Aquila’s application in Case No. EA-2005-0248. The Commission takes administrative notice of this franchise.

no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen.”¹⁰ The Supreme Court of Missouri has stated that “. . . the permission granted by a county court pursuant to Section 229.100 . . . to a public utility to use the county roads is a ‘county franchise,’ supplying the consent required by Section 393.170.”¹¹

The Commission rejects StopAquila’s argument that Aquila would be required to obtain county zoning approval for the facilities as a prerequisite to the Commission’s order granting Aquila’s application. In *Aquila*, the Court of Appeals recognized that Aquila qualifies for the exemption from county zoning found in Section 64.235 and further held that the approval required to exempt Aquila could come from either the Cass County Commission or the Public Service Commission.¹² Thus, if the Commission approves Aquila’s application, the facilities may be exempt from county zoning.

Next, StopAquila.org argues that Section 64.285, which gives first class non-charter counties the power to control land use, supersedes any other statute which would interfere with such power. According to that argument, Section 64.285 would then be an exception to Section 64.235, which would render the exemption in Section 64.235 meaningless. Furthermore, the *Aquila* court stated, “(b)ecause we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt.”¹³ Put another way, Commission approval alone might be all that Aquila needs for South Harper. The Commission is unwilling to conclude that Commission approval alone is insufficient, at least at this stage of the case.

Finally, StopAquila.org argues that the Commission cannot retroactively approve Aquila’s application for South Harper. In light of the Court of Appeals’ statement that Aquila could still apply for permission for South Harper¹⁴, and in light of the Circuit Court of Cass County’s order allowing Aquila until May 31 before the injunction against South Harper can be enforced¹⁵, the Commission is unwilling to conclude, as a matter of law, that it cannot consider Aquila’s application.

Cass County

Cass County also argues that the Commission has no authority to retroactively permit Aquila to build South Harper. It contends that the Court of Appeals, in related litigation between Cass County and Aquila, stated that a public hearing should be held before construction begins.¹⁶ In other words, Aquila is too late.

¹⁰ *Union Elec. Co.*, 770 S.W.2d at 285.

¹¹ *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964)(quoting *In re Union Elec. Co.*, 3 Mo. P.S.C. (N.S.) 157 (1951)).

¹² *Aquila* at 32.

¹³ *Id.* (emphasis supplied).

¹⁴ *Id.* at 41.

¹⁵ Circuit Court of Cass County, Case No. CV104-1443CC (Order dated February 15, 2006).

¹⁶ *Id.* at 37-38.

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In the alternative, Cass County argues that the Commission should defer to the county, and should condition a potential certificate for South Harper upon Cass County's zoning approval. While the *Aquila* decision stated that either Cass County or the Commission can hold hearings relating to South Harper, Cass County argues that the Commission would be wise to leave land-use planning matters to the county.

Section 393.170.3 allows the Commission to impose conditions upon certificates and, Cass County argues, that the Commission should impose Cass County's zoning approval as a condition upon any certificate it may grant to Aquila. Cass County claims that to do so would be consistent with the Commission's history of recognizing the dual oversight that the Commission and local authorities have over siting power plants. Moreover, because Cass County is in the business of zoning, a land-use planning hearing before Cass County would be a far more efficient use of resources than would a similar hearing before the Commission, which is less experienced in those matters. What is more, Cass County points out that should the Commission decide to hear evidence on land-use planning, the Commission has no standards to guide it on how the land on which South Harper sits should be used.

Response of Aquila

Aquila believes that Cass County's argument completely ignores the *Aquila* opinion, which states that ". . . we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate."¹⁷ Aquila argues that the Commission has the authority to consider land use issues for power plants proposed for first class non-charter counties, such as Cass County¹⁸. Furthermore, not only zoning, but other issues, such as identifying locations near load centers, identifying locations of existing gas pipelines that could deliver sufficient fuel at acceptable pressure, evaluating potential transmission infrastructure upgrades, evaluating access to water supplies, and considering construction issues, are more properly before the Commission, rather than Cass County. What is more, Aquila indicates that any attempt it would make to ask for Cass County zoning approval is doomed to fail, because Cass County is vigorously fighting to have South Harper dismantled.

Response of Staff

Staff believes that Cass County's argument discounts the Western District's opinion, as well as the Circuit Court of Cass County's order staying the injunction against Aquila until May 31. The circuit court obviously did so under the impression that Aquila could still get approval for South Harper. Staff states that the exemption in Section 64.235 would allow South Harper to remain if either the Commission or Cass County approved the plant.¹⁹ Staff believes that Aquila has as much local

¹⁷ *Id.* at 41.

¹⁸ Section 64.235.

¹⁹ *Aquila* at 32.

consent as it needs through its franchise. Staff differentiates between a franchise, which is consent, and zoning, which is restriction, to advance its argument that zoning is not the consent contemplated in Section 393.170.2, .3.

Discussion

Cass County argues that the Commission cannot retroactively approve Aquila's application for South Harper. As mentioned in the StopAquila.org Discussion section, the Commission is unwilling to conclude as a matter of law that it cannot consider Aquila's application. This decision is in line with the concept that the Commission's authority over public utilities is sweeping and, as at least one court has observed, essentially includes everything except the power to operate and manage them itself.²⁰ Moreover, the Public Service Commission Act's provisions are to be "liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."²¹

Cass County argues in the alternative that any approval of Aquila's application should be conditioned upon the Company seeking, and obtaining, county zoning approval for the facilities. The Commission has the authority to impose conditions upon a certificate as it may deem reasonable and necessary.²² The Commission will wait until after the evidentiary hearing to decide what conditions, if any, that it may impose upon a certificate that the Commission may, or may not, grant Aquila.

For these reasons, the Commission will deny the motions.

IT IS ORDERED THAT:

1. The motions to dismiss filed by StopAquila.org and Cass County, Missouri are denied.
2. This order shall become effective on April 30, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Pridgin, Regulatory Law Judge

²⁰ *State ex rel. PSC v. Bonacker*, 906 S.W.2d 896, 900 (Mo.App. 1995).

²¹ Section 386.610.

²² Section 393.170.3.

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In the Matter of Sprint Missouri, Inc., Application for Competitive Classification under Section 392.245.5, RSMo (2005).

Case No. TO-2006-0375

Decided April 20, 2006

Telecommunications §40. The Commission granted Sprint Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo. Cum. Supp. 2005, for residential and business services, other than exchange access service, for the Jefferson City exchange.

ORDER GRANTING COMPETITIVE CLASSIFICATION

Syllabus: In this Order, the Missouri Public Service Commission grants Sprint Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2005, for residential and business services, other than exchange access service, for the Jefferson City exchange. In addition, the Commission approves the tariff revisions filed to implement these classifications.

Procedural History

On March 31, 2006, Sprint Missouri, Inc., filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2005. In its application, Sprint requested that the Commission classify as competitive its residential and business services, other than exchange access service, in the Jefferson City exchange. Concurrent with the filing of its application, Sprint filed proposed tariffs to become effective on May 1, 2006, reflecting the requested competitive classifications.

The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than April 5, 2006. No request for intervention was received and no party filed an objection to the application.

Staff filed its verified recommendation on April 10, 2006. As part of its recommendation, Staff filed affidavits from two facility-based competitive local exchange carriers (CLECs) and one wireless carrier. Those affidavits provided information about customers being served in the relevant exchanges. Staff recommended that Sprint's application be granted.

Overview

Sprint is a large incumbent local exchange carrier (ILEC) that became subject to price cap regulation under Section 392.245, RSMo Cum. Supp. 2005. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges

served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten-days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.¹

The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.² The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."³ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services.

Sprint's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for both residential and business services in the Jefferson City exchange.

Findings of Fact

The Missouri Public Service Commission, having considered all of the verified pleadings, which are admitted into evidence, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Sprint is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000. Sprint is a large ILEC subject to price cap regulation.

In its application, Sprint requested that the Commission classify the residential and business services, except for exchange access, in the Jefferson City exchange as competitive. In support of this request, Sprint filed its verified application including maps of the service territory of wireless carriers in the relevant exchanges.⁴ In addition, Sprint filed proposed tariff sheets.⁵

¹ Section 392.245.5(6), RSMo Cum. Supp. 2005.

² Section 392.245.5(1), RSMo Cum. Supp. 2005.

³ Section 392.245.5(2), RSMo Cum. Supp. 2005.

⁴ Exhibit A.

⁵ Exhibit B.

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Staff also provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. According to Staff's recommendation, the Jefferson City exchange for which Sprint requests competitive status has at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to at least two residential customers and two business customers with addresses within the exchange.

Attached to Staff's recommendation were the affidavits of Calvin Craib, President of MCC Telephony of Missouri (Mediacom),⁶ Matt Kohly, Director of Socket Telecom LLC,⁷ and Jeff Sorensen, Regulatory Accounting Lead of United States Cellular Corporation.

The Commission finds that the facts as submitted in the verified application and the verified Staff Recommendation, including the affidavits of competing service providers, are reliable and support the grant of competitive classification in the requested exchange. The Commission finds that in the Jefferson City exchange facilities-based local voice service is being provided to residential customers by Mediacom and to business customers by Socket. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services carrier, United States Cellular Corporation, providing service to residential customers and business customers in the Jefferson City exchange.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo Cum. Supp. 2005, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Sprint is an incumbent local exchange telecommunications company and has requested competitive classification of its business and residential services in the Jefferson City exchange.

Section 392.245.5, RSMo Cum. Supp. 2005, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any

⁶ Schedule 1 HC.

⁷ Schedule 2 HC.

exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."⁸ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest."⁹

Section 392.245.5(3), RSMo Cum. Supp. 2005, defines "local voice service" as meaning "[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000."

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."¹⁰

Sprint is asserting that its services in the Jefferson City exchange should be classified as competitive. As the party asserting the positive of a proposition, Sprint has the burden of proving that proposition.¹¹

Because the opportunity for a hearing was provided and no proper party requested to present evidence, the Commission may rely on the verified pleadings filed by Sprint and the Staff in making its decision in this case.¹²

Decision

The undisputed evidence establishes that for both business and residential customers the Jefferson City exchange there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3), RSMo Cum.

⁸ Section 392.245.5(1), RSMo Cum. Supp. 2005.

⁹ Section 392.245.5(2), RSMo Cum. Supp. 2005.

¹⁰ Section 386.020(52), RSMo 2000.

¹¹ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

¹² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission of the State of Missouri*, 776 S.W.2d 494 (Mo. App. 1989).

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Supp. 2005. Furthermore, the undisputed evidence establishes that for both business customers and residential customers in the Jefferson City exchange there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1), RSMo Cum. Supp. 2005. Therefore, the Commission concludes that Sprint's application for competitive classification of its residential and business services, other than exchange access services, in the Jefferson City exchange should be granted.

As required by the statute, Sprint submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of May 1, 2006. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

IT IS ORDERED THAT:

1. Sprint Missouri, Inc.'s residential and business services, other than exchange access service, are classified as competitive in the Jefferson City exchange.
2. Sprint Missouri, Inc.'s proposed tariff revisions (Tracking No. YI-2006-0761) filed on March 31, 2006, are approved to become effective for service on or after May 1, 2006.
3. This order shall become effective May 1, 2006.

Davis, Chm., Murray, and Appling, CC., concur.
Gaw and Clayton, CC., concur, with separate
joint concurring opinion attached.

Voss, Regulatory Law Judge

**CONCURRING OPINION OF COMMISSIONERS ROBERT M.
CLAYTON III AND STEVE GAW**

The Commission approved Sprint's request for competitive classification in the Jefferson City exchange pursuant to §392.245(5) RSMo. Cum. Supp. 2005, in its Report and Order. These Commissioners voted to support the Report and Order but are compelled to write a separate concurrence because the Order fails to reference evidence which established the existence of toll-free, local service with local telephone numbers for wireless carriers in the Jefferson City exchange. Such evidence is required by the statute and should be included in the Commission's Order.

In five previous competitive classification cases¹, these Commissioners have relied, in part, on evidence establishing that consumers in an exchange have the ability to make and receive local, toll-free calls with customers of other providers

¹ See, *In Re Sprint*, Case No. IO-2006-0092, Opinion of Commissioner Clayton, Concurring, in part, and Dissenting, in part, Dissenting Opinion of Commissioner Gaw; *In Re SBC*, Case No. TO-2006-0093 ; Dissenting Opinion of Commissioner Gaw, Opinion of Commissioner Clayton, Dissenting, in part, and Concurring in part; *In Re Centurytel*, Case No. IO-2006-0109, Report and Order, Opinion of Commissioner Clayton, Concurring, in part and Dissenting, in part; Concurring Opinion of Commissioner Gaw; *In Re CenturyTel*, Case No. IO-2006-0316, Opinion of Commissioners Clayton, Dissenting, in part, and Concurring, in part; *In Re Spectra*, Case No. IO-2006-0317, Opinion of Commissioners Clayton and Gaw, Dissenting, in part, and Concurring, in part.

competing with the ILEC. In the present case, the parties have submitted ample evidence demonstrating that customers in the Jefferson City exchange are able to make and receive local, toll-free calls to competing carriers' customers including wireless customers. When a wireless provider acquires telephone numbers with an N-X-X from the exchange in question, wireline callers are able reach the wireless customer without paying a toll. Such ability is what allows the wireless carrier to effectively compete with the ILEC.

Regulation may be replaced by a vibrant, competitive market. It is our duty to follow the provisions of §392.245(5) to ensure customers of an exchange truly have a choice in a telephone service provider. The ability to make and receive local, toll-free calls was clearly contemplated by the legislature and it should be a critical piece of the Commission's analysis in competitive classification cases and our orders should demonstrate that we have considered this evidence. Although evidence was received establishing these elements, the majority opinion fails to reflect this crucial information in its decision.

Based on the foregoing reasons, these Commissioners concur.

**In the Matter of the Application for Approval of the Transfer of
Control of Alltel Missouri, Inc., and the Transfer of Alltel
Communications, Inc., Interexchange Service Customer
Base.**

*Case No. TM-2006-0272
Decided April 25, 2006*

Telecommunications §4. The Commission approved Alltel Missouri, Inc., Alltel Communications, Inc., Alltel Holding Corp., Alltel Holding Corporate Services, Inc., and Valor Communications Group, Inc.'s joint application that transferred control of Alltel Missouri, Inc., to Alltel Holding Corp. It also approved the transfer of Alltel Communications, Inc.'s interexchange service customer base to Alltel Holding Corporate Services, Inc. This is basically separating Alltel's wireline business from its wireless business and merging the wireline business with Valor Communications Group, Inc.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement submitted by the parties.

On December 22, 2005, Alltel Missouri, Inc., Alltel Communications, Inc., Alltel Holding Corp., Alltel Holding Corporate Services, Inc., and Valor Communications Group, Inc., submitted a joint application seeking Commission approval of a plan to transfer control of Alltel Missouri, Inc., to Alltel Holding Corp. The application also seeks approval to transfer Alltel Communications, Inc.'s interexchange service customer base to Alltel Holding Corporate Services, Inc. These two transactions are part of an overall transaction wherein Alltel Corporation is separating its wireline business from its wireless business and merging the wireline business with Valor Communications Group, Inc.

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The Commission invited intervenors to apply by February 2, 2006. None applied. On April 13, 2006, the joint applicants, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel filed a Unanimous Stipulation and Agreement. A copy of the stipulation and agreement is attached to this order as Attachment A.

The joint applicants ask the Commission to approve their plan to spin off the wireline incumbent local exchange and interexchange services to become part of an independent, stand-alone operation. Alltel Missouri, Inc., Alltel Communications, Inc., and Alltel Holding Corp. are currently subsidiaries of Alltel Corporation. First, Alltel Corporation will transfer control of Alltel Missouri, Inc., and Alltel's other incumbent local exchange company subsidiaries to Alltel Holding Corp. The customer base of Alltel Communications, Inc.'s interexchange businesses will be transferred to Alltel Holding Corporate Services, Inc., which will become a wholly-owned subsidiary of Alltel Holding Corp. The ownership of Alltel Holding Corp. will then be transferred from Alltel Corporation to its shareholders, thereby establishing Alltel Holding Corp., with its subsidiary Alltel Holding Corporate Services, Inc., as a stand-alone holding company. Finally, Alltel Holding Corp. will merge with Valor Communications Group, a holding company with its own local exchange company subsidiaries operating in the states of Texas, New Mexico, Oklahoma and Arkansas, resulting in the "merged wireline business." Diagrams of the pre-separation and post-separation corporate structures and the merged wireline business are attached to the application as Exhibits 1, 2 and 3.

On January 23, 2006, the joint applicants filed a First Supplement to their application seeking approval for Alltel Missouri, Inc., to give its Guarantees and Liens to secure debt financing of the transactions proposed in this process. The joint applicants now advise that Alltel Missouri, Inc., will not be required to execute such Guarantees and Liens, therefore, approval for their execution is no longer required or sought by the applicants.

The joint application sought a waiver of the application of 4 CSR 240-3.535(1)(A), the rule requiring an application for authority to acquire stock of a public utility to include a statement of the offer to purchase the stock or a copy of any agreement entered with shareholders to purchase stock. The joint applicants allege good cause for the waiver because the transfer of ownership of Alltel Missouri, Inc., to Alltel Holding Corp. will occur by intercompany transfer and there will be no "purchase" of stock as contemplated by Rule 3.535(A). The parties stipulate and agree that a waiver of that rule should be granted, for good cause, for the reasons set forth here and in the stipulation.

The stipulation and agreement provides that the existing certificates of service authority held by Alltel Missouri, Inc., Alltel Communications, Inc., and Alltel Holding Corporate Services, Inc., should remain in effect as of the date of closing of the transfer of control described in the application.

The parties to the stipulation and agreement agree that the Commission should approve the joint application and allow the spin-off to proceed, subject, however, to several conditions specified in the stipulation and agreement. The parties to the stipulation and agreement agree that, subject to the agreed upon conditions, the transaction proposed in the joint application is not detrimental to the public interest.

The Staff filed Suggestions in Support of Stipulation and Agreement on April 18, 2006, addressing, primarily, the financial conditions to place upon the companies to ensure that Missouri customers continue to receive safe and adequate service at just and reasonable rates after the close of this transaction. Staff states the conditions it proposed and agreed to by the joint applicants in the stipulation and agreement ensure that the transaction contemplated by the joint applicants is not detrimental to the public interest.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case.¹ Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.² Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the stipulation and agreement.

Based on the agreement of the parties, the Commission believes that the parties have reached a just and reasonable settlement.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed on April 13, 2006, is approved as a resolution of all issues in this case (See Attachment A).
2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement.
3. The transaction described in the Application for Approval of Transfer of Control of Alltel Missouri, Inc., and Transfer of Alltel Communications, Inc. Interexchange Service Customer Base, filed on December 22, 2005, is not detrimental to the public interest and is approved, subject to the terms and conditions of the Stipulation and Agreement.
4. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes. The Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions, and their results in cost of capital, in any later proceeding.
5. This order shall become effective on May 5, 2006.
6. This case shall be closed on May 6, 2006.

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Reed, Regulatory Law Judge

Editor's Note: Attachment A, the Unanimous Stipulation and Agreement has not been published. If needed, this document is available in the official case files of the Public Service Commission.

¹ Section 536.060, RSMo Supp. 2005.

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

In the Matter of the Application of The Empire District Electric Company for Authority to Issue and Sell under Its Existing Indenture of Mortgage and Deed of Trust Dated as of September 1, 1944, as Amended and Supplemented, up to and Including \$255,000,000 Principal Amount of its First Mortgage Bonds, in One or More Series and to, Among Other Things, Execute and Deliver a Supplemental Indenture or Indentures to Provide for the Terms of Said Bonds.

Case No. EF-2006-0263

Decided April 25, 2006

Electric §1. The Commission granted Empire District Electric Company's application to sell up to \$200,000,000 of First Mortgage Bonds issued under its existing indenture of Mortgage and Deed of Trust. The Commission also outlined many of specific requirements that Empire must meet. The transaction also was not considered to be detrimental to public interest.

ORDER GRANTING APPLICATION

This order grants the application filed by The Empire District Electric Company to sell up to \$200,000,000 of First Mortgage Bonds issued under its existing Indenture of Mortgage and Deed of Trust.

The Application

On December 19, 2005, The Empire District Electric Company asked for permission to sell up to and including \$255,000,000 principal amount of its First Mortgage Bonds under its existing Indenture of Mortgage and Deed of Trust. According to its application, Empire has an Indenture of Mortgage and Deed of Trust dated September 1, 1944. The Indenture of Mortgage and Deed of Trust, as supplemented, are a first mortgage lien on substantially all of Empire's property.

Empire will create a lien or encumbrance on its property to secure payment of the bond indebtedness, and therefore seeks the Commission's approval under Section 393.190.1 RSMo 2000. Empire plans to apply the proceeds of the bond sale to its general funds.

Staff Recommendation

The Staff of the Commission filed its Recommendation on March 31. Staff recommends that the Commission approve the application, subject to nine conditions. One condition is that Empire issue only \$200,000,000 in bonds, because Empire has decided to use \$55,000,000 of unsecured debt, instead of the originally planned secured debt, to acquire Aquila's Missouri gas properties. Therefore, Empire will only need to issue \$200,000,000 in bonds.

Empire responded on April 7, stating that it did not object to Staff's conditions, with one exception. Empire wants the word "electric" removed from Staff's fourth condition because Empire also has regulated water operations in Missouri.

Empire states that it has no intention to use the proceeds of the bond sales for anything other than regulated purposes.

Staff replied on April 17, stating that Empire specifically mentioned its experimental regulatory plan for electric operations, and that Staff focused on Empire's electric operations only when it formed its Recommendation. Staff proposes broader language for its fourth condition that would include Empire's electric and water operations, and states that Empire does not object to Staff's proposal.

Discussion

The Commission has reviewed the parties' verified pleadings, which are admitted into evidence. The Commission finds that the transaction would not be detrimental to the public interest, and will therefore approve the transaction, subject to the conditions listed below, to which Empire and Staff agree.

IT IS ORDERED THAT:

1. The application filed by The Empire District Electric Company is granted, subject to the following conditions:

A. The Empire District Electric Company shall be authorized to issue up to the reduced amount of \$200,000,000 in First Mortgage Bonds under its existing Indenture of Mortgage and Deed of Trust. The Empire District Electric Company shall not be authorized to use any portion of the debt securities for any purpose other than to discharge long term indebtedness by the payment of principal at maturity, to refinance outstanding indebtedness, including the payment of applicable redemption premiums, for construction identified as Projected Infrastructure Investments in Appendix A of the Experimental Regulatory Plan in Case No. EO-2005-0263, for construction associated with the Plum Point Power Plant and for other incidental electric utility construction projects.

B. The Empire District Electric Company shall submit to the Financial Analysis Department of the Commission the three key financial ratios (i.e., Adjusted Total Debt to Total Capitalization, Adjusted Funds From Operations Interest Coverage, and Adjusted Funds From Operations as a percentage of Average Total Debt) that were agreed to and defined in the Stipulation and Agreement in Case No. EO-2005-0263. The financial ratios shall be submitted on a quarterly calendar year basis and after each issuance of long-term debt and/or common stock identified in Appendix 5 of the Application. The requirement to submit the financial ratios on a quarterly calendar year basis shall begin after the first issuance of First Mortgage Bonds covered by this Application. The ratios shall be calculated for The Empire District Electric Company on a consolidated basis and for The Empire District Electric Company's Missouri jurisdictional electric utility operations.

C. The Empire District Electric Company's Adjusted Total Debt to Total Capitalization Ratio objective shall be 56.5% during the period of the Experimental Regulatory Plan approved by the Commission in Case No. EO-2005-0263. If the Adjusted Total Debt to Total Capitalization Ratio exceeds 56.5% based on a rolling twelve month average for the period subject to review in a rate case during the period of the Experimental Regulatory Plan, the amount of debt by which the 56.5% limit is exceeded and its associated interest expense shall not be considered in the calculation for determining additional amortization in any such rate case.

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D. The Empire District Electric Company shall make available to the Staff of the Commission sufficient documentation to ensure: 1) that the funds acquired through the issuance of securities under the Application shall be used exclusively for the benefit of The Empire District Electric Company's regulated electric utility operations, and not for the other operations of The Empire District Electric Company or any of its affiliates or non-regulated activities; and 2) that the amount of any and all other benefits that accrue to the funds shall be used exclusively for the benefit of The Empire District Electric Company's regulated electric and water utility operations.

E. The Empire District Electric Company shall be required to file with the Commission all final terms and conditions on this financing including, but not limited to, the aggregate principal amount to be sold or borrowed, price information, estimated expenses, and the loan or indenture agreement concerning each issuance.

F. The interest rates for these debt issuances shall not exceed 9% including any applicable discounts unless The Empire District Electric Company first obtains the Commission's approval.

G. The Empire District Electric Company shall submit to the Financial Analysis Department of the Commission any information concerning communications with credit rating agencies in connection with this issuance(s).

H. Nothing in the Commission's order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding.

I. The Empire District Electric Company shall file with the Financial Analysis Department of the Commission any information concerning use of the funds from the issuance(s) with regard to redemption of any outstanding long-term debt, including Net Present Value calculations indicating the amount of interest cost savings.

2. The Commission authorizes The Empire District Electric Company to execute, deliver and perform the agreements and instruments necessary to issue up to \$200,000,000 in First Mortgage Bonds under its existing Indenture of Mortgage and Deed of Trust as approved in this order.

3. This order shall become effective on May 5, 2006.

4. This case may be closed on May 6, 2006.

Davis, Chm., Murray, Clayton,
and Appling, CC., concur.
Gaw, C., dissents.
Pridgin, Regulatory Law Judge

**In the Matter of the Empire District Electric Company of Joplin,
Missouri for Authority to File Tariffs Increasing Rates for
Electric Service Provided to Customers in the Missouri
Service Area of the Company.***

Case No. ER-2005-0315

Decided May 2, 2006

Electric §20. Empire sought to terminate the use of the interim energy charge ("IEC") and implement an energy cost recovery rider ("ECR"). The Commission agreed to it but clarified that The Empire District Electric Company, pursuant to the Stipulation and Agreement, was not to make any request for an energy cost recovery rider while the existing interim energy charge was effective.

**ORDER CLARIFYING CONTINUED
APPLICABILITY OF THE INTERIM ENERGY CHARGE**

On March 24, 2006, The Empire District Electric Company ("Empire") requested clarification of certain language contained in a Stipulation and Agreement entered in its previous rate case, ER-2004-0570. Empire, in the present case, seeks to terminate the use of the interim energy charge ("IEC") and implement an energy cost recovery rider ("ECR"). Certain other Parties oppose Empire's attempt, asserting that it contravenes the Stipulation and Agreement in Case No. ER-2004-0570 ("the Stipulation").

Empire's position is that the Stipulation contemplated the use of the IEC for up to three years, but it could be terminated at any time during that period by the Commission. Empire notes the following language:

The IEC tariff or rate schedule will expire no later than 12:01 a.m. on the date that is three years after the original effective date of the revised tariff sheets authorized by the Commission in this case, Case No. ER-2004-0570, unless earlier terminated by the Commission.

Empire asserts that this language contemplates the possibility that the IEC could be terminated early, allowing Empire to avail itself of the newly-created ECR.

In its Response to Empire's motion, the Staff points out that the tariffs filed pursuant to the Stipulation are not dispositive in that they do not provide for early termination of the IEC. However, Staff notes that although the previous tariffs did not so provide, the IEC was prematurely terminated despite the lack of such language. Staff indicates that it is clear that the Commission has the authority to terminate the IEC prematurely, according to the terms of the Stipulation, but that such language in the Stipulation is merely a restatement of the Commission's legal authority.

The Public Counsel notes that its agreement to the IEC was the result of consideration given by Parties on both sides to the Stipulation. On the one hand,

* See pages 477 and 592 for other orders in this case.

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Empire was permitted to use a type of fuel adjustment clause prior to the availability of the ECR, but the Public Counsel and others benefited by certain safeguards such as charge limits, true-ups and refunds.

Praxair, Inc and Explorer Pipeline ("Praxair") also oppose allowing Empire to elect early termination of the IEC in favor of the ERC, in that the four corners of the Stipulation document preclude it (among other reasons). Specifically, Praxair highlights the following language in section 4, page 12:

In consideration of the implementation of the IEC in this case and the agreement of the Parties to waive their respective rights to judicial review or to otherwise challenge a Commission order in this case authorizing and approving the subject IEC, for the duration of the IEC approved in this case Empire agrees to forego any right it may have **to request the use of**, or to use, any other procedure or remedy, available under current Missouri statute or subsequently enacted Missouri statute, in the form of a fuel adjustment clause, a natural gas cost recovery mechanism, or other energy related adjustment mechanism to which the Company would otherwise be entitled.[emphasis added]

Although Empire argues that the language of the Stipulation serves only to require that it not have both an IEC and an ERC in effect simultaneously, the language of the preceding paragraph does not support this. Empire's position requires that the phrase "to request the use of" highlighted above to be a nullity. The language following that phrase, "to use[,] any other procedure or remedy ... under Missouri statute" clearly precludes the simultaneous use of two different kinds of fuel adjustment mechanism. The inclusion of "to request the use of" can only mean that Empire is precluded from requesting the use of another fuel adjustment mechanism during the period in which the IEC is in effect.

However, Empire may have the option of requesting that the IEC be terminated. If the Commission grants that request, once the IEC is terminated, Empire would be able to request an alternative fuel adjustment mechanism.

The Stipulation and Agreement was freely negotiated. Consideration was given and received. The Commission approved it and it is binding. The Commission can and shall require that Empire remove from its pleadings and other filings in this case the request it consented not to make. Any other remedies that may address assertions that the request has "tainted" this proceeding are not available to the Commission. To the extent the Parties believed they have been aggrieved in a way the Commission cannot remedy, they should seek relief in an appropriate forum.

IT IS ORDERED THAT:

1. The Commission clarifies that The Empire District Electric Company, pursuant to the Stipulation and Agreement, may not make any request for an energy cost recovery rider while the existing interim energy charge is effective.

2. This order shall become effective on May 12, 2006.

Davis, Chm., Murray, Gaw, Clayton,
Appling, CC., concur

Dale, Chief Regulatory Law Judge

In the Matter of a Request for Expansion of the St. Louis Metropolitan Calling Area Plan to include the Exchanges of Washington, Union, Wright City, St. Clair, Marthasville, Beaufort, Foley and, Warrenton.

Case No. TO-2005-0141
Decided May 18, 2006

Telecommunications §7. The Commission had the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.

Telecommunications §27. The parties involved agreed that the Wright City, Marthasville, Foley, Warrenton, and Holstein exchanges will become a new Tier 6 of the St. Louis Metropolitan Calling Area Plan. The Commission had legal authority to accept that agreement between the parties and does not make either findings of fact or conclusions of law in this order.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND ORDER DIRECTING FILING**

Syllabus: This order approves the Stipulation and Agreement and directs CenturyTel of Missouri, LLC, to file tariffs in order to implement the terms of that agreement.

On April 18, 2006, the Office of the Public Counsel, CenturyTel, and the Staff of the Missouri Public Service Commission filed a Stipulation and Agreement. None of the intervenors signed the agreement, but according to Commission rule 4 CSR 240-2.115(2)(C), if no party objects, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement. Orchard Farm Telephone Company filed a response in which it said it did not oppose the agreement but that it wanted to "reserve the right to file revenue neutral tariffs if implementation of the Stipulation and Agreement results in a material revenue loss to Orchard Farm." No other party responded and, therefore, the Stipulation and Agreement will be treated as a unanimous stipulation and agreement.

The parties agreed that the Foley, Holstein, Marthasville, Warrenton, and Wright City exchanges will become a new Tier 6 of the St. Louis Metropolitan Calling Area (MCA) Plan. MCA service for the five CenturyTel exchanges would be optional and would cost \$35.50 for residential customers and \$95.00 for business customers in addition to basic local service and any other extended area service

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(EAS) charges. The parties also agreed that, under the current law, CenturyTel may revise its prices through the tariff process. Customers subscribing to the MCA service will need to change their telephone number to an MCA-designated telephone number. In addition to their local calling scope, subscribers to the new MCA Tier 6 will be able to call without a toll charge to all numbers in MCA-Central, MCA Tiers 1 through 5, and to all Tier 6 MCA subscribers. The parties also agreed that all other provisions of the MCA plan will apply, including bill-and-keep compensation.

The Commission held public hearings in Washington, Missouri, on January 12, 2006, and in Innsbrook, Missouri, on January 18, 2006, to receive comments about the plan filed by the Public Counsel. On February 23, 2006, the Commission approved a Stipulation and Agreement adding certain AT&T Missouri exchanges to Tier 5.

The parties indicated in their agreement that it will take time for CenturyTel and each of the other telecommunications carriers participating in the St. Louis MCA to revise their routing functions in order to accommodate these changes. CenturyTel will also need to file revised tariffs.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ In reviewing the agreement, the Commission notes that²

[e]very decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement and the verified pleadings filed in this docket, which are hereby admitted into evidence.

The record reflects that while an optional MCA plan may not be the best choice for some customers, it is in the public interest to have the option available. Customers who choose to subscribe will benefit from a greatly increased calling scope and two way calling from certain MCA Tiers and other MCA subscribers.

Based on the agreement of the parties and the testimony received at the local public hearings, the Commission finds that the parties have reached a just and reasonable settlement in this case. Accordingly, the Commission shall direct the

¹ Section 536.060, RSMo Supp. 2005.

² Section 536.090, RSMo Supp. 2005. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

parties to abide by the terms of the agreement. The Commission shall also direct CenturyTel to expeditiously file proposed tariff sheets with an effective date on the earliest possible date that the provisions of the agreement can be implemented.

As a note to potential MCA plan subscribers in these exchanges, the Commission recommends that before subscribing to any calling plan, especially an optional plan that would require getting a new telephone number, telephone customers should review the various calling plans available from CenturyTel and the other competitive local exchange carriers in the area. There are numerous offerings available for both business and residential customers. Customers should ask specific questions and understand what the plans cover and what they cost before subscribing to any plan. Resources for comparing calling plans and links to consumer information websites can be found at the Commission's website, <http://www.psc.mo.gov/consumer-information.asp>, as well as at the website for the Office of the Public Counsel, <http://www.mo-opc.org/telephone/longdist.htm>.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on April 18, 2006, is hereby approved (See Attachment A).
2. The parties to this case are ordered to comply with the terms of the Stipulation and Agreement.
3. No later than June 19, 2006, CenturyTel of Missouri, LLC, shall file tariff sheets designed to implement the provisions of the Stipulation and Agreement with an effective date that is the earliest possible date that the provisions of the agreement can be implemented.
4. This order shall become effective on May 28, 2006.

Davis, Chm., Murray, Gaw, and Appling,
CC., concur.
Clayton, C., absent.

Dippell, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC, pursuant to Section 251(b)(1) of the Telecommunications Act of 1996.*

Case No. TO-2006-0299

Decided May 18, 2006

Telecommunications §46.1. Socket Telecom filed a petition for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, USC ("the Act"), and Commission rule 4 CSR 240-36.040. Socket asks the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group LLC d/b/a CenturyTel of Missouri.

ARBITRATOR'S FINAL REPORT

APPEARANCES

Bill Magness and Brad Bayliff, 98 San Jacinto Blvd., Suite 1400, Austin, TX 78701. Attorney for Socket Telecom, LLC.

Larry Dority, Fischer and Dority, PC, 101 Madison, suite 400, Jefferson City, MO 65101. Attorney for CenturyTel of Missouri, LLC and Spectra Communications, LLC.

David Brown, Floyd Hartley and Gavin Hill, Hughes & Luce, L. L. P., 111 Congress Avenue, Suite 900, Austin, TX 7801. Attorneys for CenturyTel of Missouri, LLC. and Spectra Communications, LLC

Arbitrator: Kennard L. Jones, Administrative Law Judge

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Adam McKinnie, Regulatory Economist II, Missouri Public Service Commission.

Mike Scheperle, Regulatory Economist II, Missouri Public Service Commission.

Larry Henderson, Utility Operations Technical Specialist II, Missouri Public Service Commission.

* See pages 482 and 548 for other orders in this case.

PROCEDURAL HISTORY

On January 13, 2006, Socket Telecom, LLC filed a petition for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, United States Code ("the Act"), and Commission rule 4 CSR 240-36.040. Socket asks the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group, LLC d/b/a CenturyTel of Missouri. The Arbitrator conducted an evidentiary hearing on April 13, 2006.

During the course of these proceedings, the parties have settled a number of contested issues. Those issues will not be discussed in this Report.

Commission rule 4 CSR 240-36.040(19)

This rule states that "[u]nless the results would be clearly unreasonable or contrary to public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue." Because the parties in this matter have, in some instances, presented clearly unreasonable positions, the Arbitrator is unable to select one position over the other and therefore, reasonably alternative disposition of the issue.

STATEMENT OF FINDINGS AND CONCLUSIONS

Article II – Definitions

Issue 6 – Should the parties' interconnection agreement extend obligations to CenturyTel affiliates?

Petitioner (Socket) – Socket argues that the definition of "currently available", with regard to requested orders and services, should include services, features, functions and capabilities that CenturyTel and its affiliates are able to provide.¹

Respondent (CenturyTel) – CenturyTel argues that the definition of "currently available", with regard to requested orders and service, should include service, features, functions and capabilities that it provides to itself and its end-users.²

Arbitrator's Decision 47 CFR 64.1903(3) states as follows:

The affiliate shall acquire any services from its affiliated exchange companies for which the affiliated exchange companies are required to file a tariff at tariffed rates, terms, and conditions. Nothing in this section shall prohibit the affiliate from acquiring any unbundled network elements or exchange services for the provision of a telecommunications service from its affiliated exchange companies, subject to the same terms and conditions as provided in an agreement approved under Section 252 of the [Telecommunications Act].

Based on the applicability of these requirements to CenturyTel's operations, CenturyTel's language most accurately describes the relationship by which CenturyTel is required to provide service to Socket.

¹ Kohly Direct at 22-27 and rebuttal.

² Simshaw Direct 44-47.

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Issue 14 – How should the interconnection agreement define “Information Access” and “Information Access Traffic”?

Petitioner (Socket) – Socket argues that its definition is simpler because it does not incorporate FCC decisions in the definition as CenturyTel has done. FCC decisions are subject to interpretation and bring unnecessary ambiguity to the definition.³

Respondent (CenturyTel) – CenturyTel argues that Socket's definition improperly erects arbitrage opportunities, is inconsistent with the goals of the Telecommunications Act and sound economic and regulatory principles, and does not fairly allocate responsibility between the parties.⁴

Arbitrator's Decision – In its ISP Remand Order at paragraph 44, the FCC concluded that:

“Congress’ reference to ‘information access’ in section 251 (g) was intended to incorporate the meaning of the phrase ‘information access’ as used in the AT&T Consent Decree Under the consent decree, ‘information access’ was purchased by ‘information service providers’ and was defined as ‘the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services’. We conclude that this definition of ‘information access’ was meant to include all access traffic that was routed by a LEC ‘to or from’ providers of information services, of which ISPs are a subset.”

Socket's language inserts the language: “and where necessary, the provision of network signaling and other functions.” With the exception of this additional clause, Sockets’ language will be incorporated in the interconnection agreement.

Issue 15 – Which party's definition of “Internet Service Provider” should be used?

Petitioner (Socket) – Socket argues that its proposed definition comes directly from the FCC's ISP Remand Order, is simple and straight forward.⁵

Respondent (CenturyTel) – CenturyTel argues that Socket's proposed definition creates opportunities for arbitrage. CenturyTel emphasizes that this definition critically impacts how the parties treat Virtual NXX dial-up ISP traffic.⁶

Arbitrator's Decision – At paragraph 11 of the ISP Remand Order, the FCC defines an Internet Service Provider as a subset of enhanced service providers. The FCC notes that ISPs may utilize LEC services to provide their customers with access to the Internet. As noted in Issue 14, the FCC determined that information

³ Kohly Direct 28-31 and Rebuttal.

⁴ Simshaw 5-35, 39-42.

⁵ Kohly Direct 31-32 and Rebuttal.

⁶ Simshaw 5-35, 39-42.

access traffic flows to or from the Internet Service Provider. Therefore, Socket's language is most consistent with the FCC's definition.

Issue 16 – How should the parties' interconnection agreement define "IntraLATA Toll Traffic"?

Petitioner (Socket) – Socket argues that its definition is consistent with Missouri statutes, FCC and Missouri PSC rules.⁷

Respondent (CenturyTel) – CenturyTel argues that Socket's proposed definition does not adequately reflect the existing industry marketplace and is operationally problematic.⁸

Arbitrator's Decision – An intraLATA toll call is one that stays within LATA boundaries but that is "between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."⁹ Socket's definition most closely reflects the intent of this definition.

Issue 34 – Which party's definition for Dedicated Transport is appropriate?

Petitioner (Socket) – Socket argues that its definition includes dedicated transport between a CenturyTel end office and a Spectra end office because these two entities are fully integrated, managed jointly, operating under the same name and in the same LATA.¹⁰

Respondent (CenturyTel) – CenturyTel argues that Socket's proposed definition is inconsistent with federal law and the FCC's Triennial Review Remand Order.

Arbitrator's Decision – In its triennial review order at paragraph 366, the FCC states:

We find that a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities within an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches.

Specifically, 47 C.F.R. 51.309(e), when defining dedicated transport, discusses "one" of an ILEC's wire centers and "another of the" ILEC's wire centers or switches. Socket's inclusion of Spectra Communications Group LLC d/b/a CenturyTel's network does not comply with the definition of dedicated transport since Spectra's network is not within CenturyTel's network.

Article III – General Provisions

Issue 2 – Should Socket's payment due date be 45 calendar days or 20 business date from the date of the bill?

Petitioner (Socket) – Socket argues that it needs a reasonable amount of time to review the bills because they are much more lengthy and complicated than retail phone bills and that a 45-day due date would accommodate that necessity.¹¹

⁷ Kohly Direct 32-34 and Rebuttal.

⁸ Simshaw Direct 43 and Rebuttal.

⁹ 47 U.S.C. §153 (48).

¹⁰ Kohly Direct 34-37 and Rebuttal.

¹¹ Kohly 37-41.

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Respondent (CenturyTel) – CenturyTel argues that its system is configured on a 30 calendar-day and that this is comparable to 20 business days. Further, that it would have to expend considerable expense to reconfigure its system and that a due date that is 20 business days from the billing date is enough time for Socket to review the bill.¹²

Arbitrator's Decision – In deciding this issue, the Arbitrator looks to existing Rules and Regulations regarding due dates on invoices submitted for payment. Specifically, Chapters 29 and 33 outline due-date criteria. Commission rule 4 CSR 240-33.040, titled Billing and Payment Standards for Residential Customers, outlines criteria for payment by residential customers to companies. Clearly, invoices by CenturyTel/Spectra to Socket are not residential invoices but are invoices pertaining to collocation, the exchange of traffic to each other and other types of wholesale services. CenturyTel references compliance with Chapter 33 as support for its position. Commission rule 4 CSR 240-33.040(5) states: If a telecommunications company does not expressly offer a preferred payment date plan, a customer shall have at least 21 days from the rendition of a bill to pay the charge stated. If the charges remain unpaid for 21 days from rendition of the bill such charges will be deemed delinquent." Commission rule 4 CSR 240-33.020(25) outlines the definition of rendition of a bill and states: "Rendition of a bill is the date a bill is mailed, posted electronically or otherwise sent to a customer."

CenturyTel outlines a bill date and due date; however, the bill is not mailed at that time but undergoes a quality assurance criteria which effectively adds 4-5 days before mailing. Socket states that it doesn't receive the invoices until approximately the 13th day after the bill date. Commission rule 4 CSR 240-29.090, titled Time Frame for the Exchange of Records, Invoices, and Payments for LEC-to-LEC Network Traffic, outlines criteria between ILECs, CLECs, CMRS providers, etc. 4 CSR 240-29.090(2) states: "Upon receiving a correct invoice requesting payment for terminating traffic placed on the LEC-to-LEC network, the originating carrier shall submit payment of all amounts not disputed in good faith within 31 days to the telecommunications company that submitted the invoice." Hence, the Arbitrator looks to existing state regulations that Socket may have 31 days to pay the invoice after the invoice is posted electronically on CenturyTel's system. If the invoice is not electronically posted on CenturyTel's system, then Socket may have 31 days from receipt of the bill.

Issue 6 – How should changes in CenturyTel's standard practices be communicated to Socket?

Petitioner (Socket) – Socket argues that its language envisions a greater level of cooperation between the parties in effecting changes and that CenturyTel's proposal to provide the name of a person that Socket can contact is insufficient.¹³

Respondent (CenturyTel) – CenturyTel argues that, in light of Socket's concerns of having to continuously monitor CenturyTel website for changes, CenturyTel has offered e-mail notifications as a reasonable solution.¹⁴

¹² P. Hankins Direct 11-16.

¹³ Kohly Direct 41-44.

¹⁴ P. Hankins Direct 5-11, 16-10 and Rebuttal.

Arbitrator's Decision – The parties have agreed to the majority of the terms to govern changes in standard practices, with the most recent settlement being CenturyTel's willingness to provide e-mail notification. The arbitrator rules that Socket's language is preferable where notification will be by e-mail to designated Socket contacts and that CenturyTel will designate a qualified person for Socket to contact to provide clarification of the scope and timeline for the change. However, the Arbitrator will not rule that either party may request the assignment of project team resources for implementation of the change. Socket's language allows Socket to reserve the right to request that a change be delayed where there is an adverse business impact on Socket, with escalation through the dispute resolution process. Socket has rights dealing with qualified persons for contact with CenturyTel concerning changes and has options should the change adversely affect Socket without a party establishing project team resources.

Article V – Interconnection and Transport and Termination of Traffic

Issue 5(A) – What methods and procedures should be included in the interconnection agreement to ensure interconnection arrangements are established and augmented efficiently?

The Arbitrator notes that the issue statement is too broad to rule on either party's position and necessarily will address each Section of the interconnection agreement language, as proposed by the parties, in ruling on these issues.

Petitioner (Socket) – Socket proposes the following language: Upon request from Socket to establish an interconnection arrangement or augment an existing interconnection arrangement. Each Party shall designate a qualified person who will oversee the establishment of the requested interconnection. This person shall serve as a project coordinator and shall be knowledgeable of the processes and procedures for establishing interconnection including, but not limited to establishing the architecture, interconnection method, hand-off level, facility availability.

Respondent (CenturyTel) – CenturyTel proposes the following language: Upon request from Socket to establish an interconnection arrangement or augment an existing interconnection arrangement, Socket may invoke the provisions of Article III, Section 7 whereby the parties will ensure that current contact and escalation information is exchanged for all functions and processes involved in implementation of interconnection.

Arbitrator's Decision – Section 2.1 - Either party should be able to assign a project coordinator, but no party should be required to assign a project coordinator or team as a general practice. The Arbitrator finds CenturyTel's language acceptable on this issue. However, CenturyTel is expected to have someone knowledgeable and qualified to assist Socket in addressing issues and questions.

Section 2.2 – No disputed language.

Section 2.3

Petitioner (Socket) – Socket proposes the following language: 2.3 Upon Request, CenturyTel shall provide to Socket technical information about CenturyTel's network facilities in sufficient detail to allow Socket to achieve interconnection.

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Respondent (CenturyTel) – CenturyTel proposed the following language: 2.3 Upon Request, CenturyTel shall provide to Socket non-proprietary technical information about CenturyTel's network facilities that is specific to Socket's provided and specific physical requirements for interconnection with Socket's network. Trunk group size shall be mutually agreed upon, based on traffic studies and availability of facilities. Socket shall compensate CenturyTel for the provision of this information through the non-recurring charge for the interconnection trunks ordered or through an Engineering Charge if Socket subsequently decides not to follow through with the interconnection method requested.

Arbitrator's Decision – Section 2.3 - According to 47 CFR 51.305(g), an ILEC shall provide to a requesting telecommunications carrier technical information about the ILEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of Section 51. Socket's language is most consistent with the intent of Section 51.305(g). To make the provision fully consistent, the Arbitrator finds Socket's language should be modified to state; "...to achieve interconnection consistent with 47 C.F.R. 51.305".

Section 2.4

Petitioner (Socket) – Socket proposes the following language: 2.4 In the event that CenturyTel asserts that it does not have the capacity to support an Interconnection Arrangement requested by Socket, CenturyTel shall provide a detailed explanation of the reason such capacity does not exist, identify any capacity that CenturyTel is reserving for its own use, and submit a construction plan for setting forth the timeline for adding the additional capacity. CenturyTel shall submit this plan to Socket and to the Manager of the Telecommunications Department of the Missouri Public Service Commission.

Respondent (CenturyTel) – CenturyTel proposes the following language: 2.4 In the event that CenturyTel does not have the capacity to support an Interconnection Arrangement requested by Socket, CenturyTel shall provide a detailed explanation of the reason such capacity does not exist. Should Socket wish CenturyTel to construct capacity to meet Socket's needs, CenturyTel and Socket shall work together to establish a construction plan and Socket shall bear all costs associated with engineering and constructing such capacity.

Arbitrator's Decision – Section 2.4 –Because it states that the parties shall work together to construct capacity to meet Socket's needs, the Arbitrator finds that CenturyTel's language is acceptable. An interconnection agreement should not place requirements on the Public Service Commission or its Staff. Further, Socket's additional language goes beyond what is expected of an ILEC.

Section 2.5

Petitioner (Socket) – Socket proposes the following language: 2.5 CenturyTel shall not delay processing and fulfilling or refuse to process and fulfill Socket's requests for additional interconnection facilities or capacity because CenturyTel believes Socket does not need the additional interconnection capacity.

Respondent (CenturyTel) – CenturyTel proposes the following language: 2.5 In the event that Socket is under utilizing its existing trunks and requests an augment, a joint meeting shall be held to discuss a resolution to Socket's request. Provided that Socket agrees to bear all costs associated with engineering and

constructing requested excess capacity, CenturyTel shall not delay processing and fulfilling or refuse to process and fulfill Socket's requests for additional interconnection facilities or capacity because CenturyTel believes Socket does not need the additional interconnection capacity.

Arbitrator's Decision – Section 2.5 - According to 47 CFR 51.305, an ILEC has the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network. An ILEC that denies a request for interconnection must prove to the state commission that interconnection is not technically feasible. The Arbitrator finds that Socket's language is most consistent with the intent of the Section 51.305.

Section 2.5.1 and 2.5.2 – Because of the Arbitrator's ruling on language in Section 2.5, this additional language is not needed.

Section 2.6.1 – There is no disputed language.

Issue 7 – Which party's contract language should be adopted regarding network interconnection provisions, including but not limited to, point of interconnection requirements, methods of interconnection, and use of the third party facilities?

The Arbitrator notes that since each section title is addressing a different issue, both titles are acceptable. However, the parties will need to work to properly structure the numbering of sections.

Section 3.2

Petitioner (Socket) – Socket proposes the following language: 3.2 Socket may utilize facilities of third parties to satisfy all requirements herein, and CenturyTel shall, if requested by Socket, route Local Interconnection Traffic that is dialed to Socket's customers to Points of Interconnection of another provider for transiting to Socket, provided such Point(s) of Interconnection comply with requirements in this agreement and provided that Socket does not have trunking of its own to the same local calling areas. CenturyTel also shall, if requested by Socket, and if Socket's circuits are busy, route overflow traffic to a third-party provider's Point(s) of Interconnection, provided such Point(s) of interconnection comply with requirements herein. CenturyTel shall accept Socket's traffic routed by way of a third party's Point of Interconnection, provided such Point of Interconnection complies with requirements herein and provided that Socket's traffic complies with the requirements herein.

Respondent (CenturyTel) – CenturyTel proposes the following language: 3.2 The Parties shall reciprocally terminate Local Traffic, (or other traffic the Parties agree to exchange) originating on each other's networks utilizing either Direct or Indirect Network Interconnections as provided in Sections 4, 5 and 6 herein. To this end, the Parties agree that there will be interoperability between their networks. In addition, the Parties will notify each other of any reasonably anticipated material change in traffic to be exchanged, in terms of e.g., traffic type, volume. Socket may utilize facilities of third parties to satisfy all requirements herein, however, any third party provider must meet the same interconnection trunk obligations under this agreement as must Socket in order for CenturyTel to route traffic bound for Socket to a third party provider.

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Arbitrator's Decision – Section 3.2 - Neither parties' language is reasonable or necessary. Socket's intent is addressed in the transiting section of this Article. Socket's language would require CenturyTel to route traffic to a transiting provider when circuits are busy. The Arbitrator is not aware of any such requirement and will not order CenturyTel to monitor traffic in this manner. CenturyTel's language includes a reference to "or other traffic the Parties agree to exchange". Either the traffic should be included in this agreement or it is covered by some other means such as a tariff. Further, CenturyTel's language includes the requirement to notify parties of any reasonably anticipated change in traffic. This concept is covered during the forecasting planning language. Beyond that, the language could require parties to disclose confidential business planning information.

Section 4.0

Petitioner (Socket) – Socket proposes the following: 4.0 REQUIREMENTS FOR ESTABLISHING POINTS OF INTERCONNECTION

Respondent (CenturyTel) – CenturyTel proposes the following: 4.0 Direct Network Interconnection.

Arbitrator's Decision – Section 4.0 – This section largely deals with the establishment of Points of Interconnection; therefore, Socket's language is acceptable.

Section 4.1

Petitioner (Socket) – Socket proposes the following language: 4.1 When direct interconnection is used, the Parties will interconnect their network facilities at a minimum of one Socket designated Point of Interconnection (POI) on CenturyTel's network in each LATA where Socket Offers Service.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.1 Direct Network Interconnection Architecture. In accordance with but only to the extent required by Applicable Law in Section 251 as codified in Part 51, the Parties shall provide interconnection of their networks at any technically feasible point and as specified in this Agreement. Socket may interconnect with CenturyTel on its network at any of the minimum Currently Available points required by the FCC. Interconnection at additional points will be reviewed on an individual case basis and must be mutually agreed upon. CenturyTel will work with Socket in all circumstances to install Interconnection Points within 120 calendar days absent extenuating circumstances. Internetwork connection and protocol must be based on industry standards developed consistent with Section 256 of the Act.

Arbitrator's Decision – Section 4.1 – For sections related to the establishment of the POI (CenturyTel 4.0, 4.1 and 4.2 and Socket 4.0, 4.1, 4.2-4.5), the Arbitrator finds neither party's position reasonable. CenturyTel has a duty to allow Socket to interconnect at any technically feasible point *within* CenturyTel's network. The Arbitrator finds that Socket is entitled to interconnect its network with CenturyTel's network at a minimum of one Point of Interconnection per LATA. To determine when an additional POI is required, the Arbitrator finds the following requirements acceptable: Socket will establish an additional POI in an exchange or pay for additional trunks to handle traffic to an exchange at such time as there is an increase in traffic to that exchange that is not attributable to CenturyTel but is deemed as local interconnection traffic or information access traffic under this agreement.

Such increase will be measured as of the traffic on the operational date of the POI. If the additional POI(s) will be established within 90 days of notification that such threshold has been met, the threshold percentage will be a 12 percent increase in local traffic. If the additional POI(s) will be established with 120 days of notification that such threshold has been met, the threshold percentage will be a 10 percent increase in local traffic. The parties will replace all language as referenced above to reflect this decision.

Sections 4.1.1 and 4.2 are addressed in Section 4.1.

Section 4.3

Petitioner (Socket) – Socket proposes the following language: 4.3 The Parties agree that Socket has the right to choose a single POI or multiple POIs within the LATA.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.3 The Parties shall make available to each other one-way or two-way trunks, as mutually agreed upon, for the reciprocal exchange of Local Traffic.

Arbitrator's Decision – Section 4.3 – Commission rule 4 CSR 240-29.050 outlines the requirements for establishing trunking. CenturyTel's language is not consistent with this provision of the Commission's Enhanced Records Exchange Rule.

Sections 4.3.1, 4.3.1.1 and 4.3.1.2 are addressed in Section 4.1.

Section 4.4

Petitioner (Socket) – Socket proposes the following language: 4.4 The additional POI(s) will be established within 90 days of notification that the threshold has been met.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.4 Neither Party is obligated under this Agreement to order reciprocal trunks or build facilities in the establishment of interconnection arrangements for the delivery of Information Access Traffic.

Arbitrator's Decision – Section 4.4 – Socket's language has already been addressed in the decision under Section 4.1. CenturyTel's language addresses trunking, not POIs and will be addressed here. Section 51.305(f) requires an ILEC, if technically feasible, to provide two-way trunking upon request. CenturyTel's language is not consistent with this requirement.

Section 4.5

Petitioner (Socket) – Socket proposes the following language: 4.5 POIs shall be established at any technically feasible point inside the geographical areas in which CenturyTel is the franchised Incumbent LEC and on CenturyTel's' network, including CenturyTel tandem offices, end offices as well as entrance facilities and outside plant, including a customer premise.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.5 [Not in Dispute] Socket will be responsible for engineering and maintaining its network on its side of the POI. CenturyTel will be responsible for engineering and maintaining its network on its side of the POI.

Arbitrator's Decision – Section 4.5 – Socket's language has already been addressed in the decision related to Section 4.1. CenturyTel's language is not in dispute.

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Section 4.6 and 4.7 are addressed in Section 4.1.

Section 5.0

Petitioner (Socket) – Socket proposes the following language: 5.0 Socket and CenturyTel will enter into a bill and keep arrangement for SS7 traffic provided that all SS7 traffic provisioned over the arrangement is associated with local interconnection traffic and that Socket has deployed a similarly situated SS7 network. In the event that Socket chooses to act as its own SS7 service provider, the parties will effectuate a Bill and Keep arrangement and shall share the cost of the SS7 quad links in each LATA between their STPs; provided, however, that said Bill and Keep arrangement and use of SS7 quad links apply only to Socket Local Interconnection Traffic and not to calls that are subject to traditional access compensation as found between a long distance carrier and a local exchange carrier, including Socket acting as a long distance carrier.

Respondent (CenturyTel) – CenturyTel proposes the following language: 5.0 New language inserted by Socket that does not have any corresponding language in CenturyTel's agreement template. CenturyTel does not understand Socket's intent so acceptance or any possible compromise language cannot yet be determined.

Arbitrator's Decision – Section 5.0 – CenturyTel's language does not make sense since Socket's language was included in the Final Offer DPL. Socket's language was not addressed in testimony. Therefore, the Arbitrator cannot rule on this language.

Section 6.0

Petitioner (Socket) – Socket proposes the following language: 6.0 INTERCONNECTION METHODS.

Respondent (CenturyTel) – CenturyTel proposes the following language: 6. X New language inserted by Socket that does not have any corresponding language in CenturyTel's agreement template. See CenturyTel section 4.1

Arbitrator's Decision – Section 6.0 – CenturyTel's language does not make sense since Socket's language was included in the Final Offer DPL. Socket's language outlines the various methods allowed for interconnection in Section 51.321. As previously stated, an ILEC has the duty to provide interconnection at any technically feasible point unless it proves to the state commission that interconnection at that point is not technically feasible. CenturyTel has not proven to the Commission that Socket's language is not technically feasible. The Arbitrator finds Socket's language acceptable.

Sections 6.1 – 6.1.6 are addressed in Section 6.

Section 6.2 and 6.2.1 – In Issue 6, Socket objects to cross-referencing another Article so the Arbitrator finds that cross-references will not be allowed here.

Section 11.6 – 11.6.2 – The Arbitrator has addressed calling scopes in other issues and with other language. This language is unnecessary and duplicative.

Issue 8 – Which party's language should be adopted regarding indirect interconnection?

The Arbitrator notes that this issue statement is too broad to rule on either party's position generically. The Arbitrator necessarily will address each Section of the Interconnection Agreement language in ruling on this issue.

Section 7.0 There is no disputed language in this section.

Section 7.1

Petitioner (Socket) – Socket proposes the following language: 7.1 Where one party chooses to route traffic through a third-Party Transit provider, the third party must have a POI with the originating and terminating carrier in the same LATA as the originating and terminating Parties' Local Routing Numbers ("LRN") as defined in the LERG. Each Party must have connection to the third Party.

Respondent (CenturyTel) – CenturyTel proposes the following language: 7.1 Where Parties agree to route traffic through a third-Party Transit provider, the third party tandem switch must be in the same LATA as the originating and terminating Parties' Local Routing Numbers ("LRN") as defined in the LERG. Each Party must have connection to the third Party tandem.

Arbitrator's Decision – Section 7.1 – Section 251(a)(1) requires each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Socket's language, which allows a party to choose indirect interconnection, is most consistent with this requirement.

Section 7.2

Petitioner (Socket) – Socket proposed no language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language: 7.2 Indirect Network Connection is intended to handle de minimus mutual Local Traffic exchange until Local Traffic volumes grow to a point where it is economically advantageous to provide a direct connection.

Arbitrator's Decision – Section 7.2 – Section 251(a)(1) requires each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. In the M2A, the Commission found, "A CLEC may choose to indirectly interconnect with SBC Missouri by using the facilities of another carrier. Such indirect interconnection does not release the CLEC from any of the obligations to which it is held under the agreement." CenturyTel's language attempts to place conditions on Socket's choice of indirect interconnection that are not conducive to Section 251(a)(1) and this Commission's previous interpretation of that section.

Section 7.3

Petitioner (Socket) – Socket did not provide any language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language: 7.3 To the extent that the Parties have utilized any Indirect Network Connection for exchange of Local Traffic, they agree to convert such connection to a direct connection when 1) traffic volumes over such connection reach a DS-1 equivalent, or 2) either Party is being charged more than \$500 monthly in transiting charges.

Arbitrator's Decision – Section 7.3 – Language for this section has already addressed in response to CenturyTel's language at 7.2.

Section 7.4

Petitioner (Socket) – Socket did not provide any language for this section

Respondent (CenturyTel) – CenturyTel proposes the following language: 7.4 Neither Party shall deliver traffic destined to terminate at the other Party's end office via another LEC's end office except as provided for in Section 4.4.5.

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Arbitrator's Decision – Section 7.4 – Language for this section has already addressed in response to CenturyTel's language at 7.2.

Issue 9 – Should interconnection facilities compensation be based on each party taking responsibility for bringing its facilities to the point of interconnection?

The Arbitrator notes that the issue statement is too broad to rule on either party's position and necessarily will address each Section of the interconnection agreement language in ruling on these issues.

Section 8.1 – No disputed language.

Section 8.2

Petitioner (Socket) – Socket proposed no language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language: 8.2 When the POI is a Collocation, Article XVI terms will apply in addition to the terms of this Article.

Arbitrator's Decision – Section 8.2 – In Issue 8 – CenturyTel objects to cross-referencing another Article so the Arbitrator finds that cross-references will not be allowed here.

Section 8.3

Petitioner (Socket) – Socket provided no language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language: 8.3 To the extent that the interconnection facility is used for both local traffic as defined in Article II and for non-local traffic, non-local traffic shall be billed in accordance with the party's applicable access tariff.

Arbitrator's Decision – Section 8.3 – CenturyTel's language references non-local traffic not subject to an interconnection agreement so this reference and language is not necessary.

Issue 10 – What language should the interconnection agreement include regarding intercarrier compensation for transport and termination of traffic?

Petitioner (Socket) – Socket proposes the following title: 9.0 INTERCARRIER COMPENSATION FOR LOCAL INTERCONNECTION TRAFFIC.

Respondent (CenturyTel) – CenturyTel proposes the following title: 9.0 Transport and Termination of Traffic.

The Arbitrator notes that this issue statement is too broad to rule on either party's position. The Arbitrator necessarily will address each Section of the Interconnection Agreement language in ruling on this issue. The Arbitrator finds that both titles accurately reflect the intent of this section. As such, this section should be titled: Intercarrier Compensation for Transport and Termination of Traffic subject to this Interconnection Agreement. The parties are directed to correct numbering to accommodate the Arbitrator's decision on Issue 10.

Section 9.1

Petitioner (Socket) – Socket proposes the following language: 9.1 This section addresses Intercarrier Compensation for the exchange of Local Interconnection Traffic.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.1 Traffic to be Exchanged. The Parties shall reciprocally terminate Local Traffic

including MCA traffic, (or other traffic the Parties agree to exchange) originating on each other's networks utilizing either Direct or Indirect Network Interconnections as provided in Sections 4, 5 and 6 herein. To this end, the Parties agree that there will be interoperability between their networks. In addition, the Parties will notify each other of any reasonably anticipated material change in traffic to be exchanged, in terms of e.g., traffic type, volume.

Arbitrator's Decision – Section 9.1 – Neither parties' language is reasonable or necessary. Socket's intent is covered by Section 9.0. CenturyTel's language includes the language; "or other traffic the Parties agree to exchange". Either the traffic should be included in this agreement or it is covered by some other means such as a tariff. Further, CenturyTel's language includes the requirement to notify parties of any reasonably anticipated change in traffic. This concept is covered during the forecasting planning language. Beyond that, the language could require parties to disclose confidential business planning information.

Section 9.2

Petitioner (Socket) – Socket proposes the following language: 9.2 MCA Traffic is traffic originated by a party providing a local calling scope pursuant to the Case No. TO-92-306 and Case No. TO-99-483 (MCA Orders) and routed as a local traffic based on the calling scope of the originating party pursuant to the MCA Orders.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2 Compensation For Exchange of Local Traffic.

Arbitrator's Decision – Section 9.2 – Socket's language is the same as CenturyTel's language for MCA Traffic which appears as 9.2.XXFX Traffic (CenturyTel proposes inserting the following in Article II-Definitions). There does not appear to be a dispute on this language. CenturyTel's intent is addressed in Section 9.0 and is not needed at this time. Parties are directed to correct the numbering to address the Arbitrator's ruling on Issue 10.

Section 9.2.1

Petitioner (Socket) – Socket proposes the following language: 9.2.1 Compensation for MCA Traffic will be consistent with the Commission's decisions in Case No. TO-92-306 and Case No. TO-99-483.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2.1 Local Mutual Compensation. The Parties shall compensate each other for the exchange of Local Traffic originated by or terminating to the Parties' end-user customers in accordance with Section 3.2.2 of this Article, subject to any applicable regulatory conditions, such as a State exempt factor, if any. The Charges for the transport and termination of optional EAS, intraLATA toll and interexchange traffic shall be in accordance with the Parties' respective intrastate or interstate access tariffs, as appropriate.

Arbitrator's Decision – Section 9.2.1 – The Arbitrator finds Socket's language acceptable. CenturyTel's language is not acceptable since it does not appear the "local mutual compensation" is defined by the agreement, the language references a Section that cannot be found in the Article (Section 3.2.2); "state exempt factor" does not appear to be defined and contains references to non-local traffic that should not be in an interconnection agreement.

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Section 9.2.2

Petitioner (Socket) – Socket proposes the following language: 9.2.2 The parties agree to use the Local Exchange Routing Guide (LERG) to provision the appropriate MCA NXXs in their networks. The LERG should be updated in accordance with industry standards for opening a new code to allow the other party the ability to make the necessary network modifications. If the Commission orders the parties to use an alternative other than the LERG, the parties will comply with the Commission's final order.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2.2 Bill and Keep. Either Party may initiate a traffic study no more frequently than once a quarter. Such traffic study shall examine all Local Traffic excluding Local Traffic that is also Information Access Traffic. Should such traffic study indicate, in the aggregate, that either Party is terminating more than sixty percent (60%) of the Parties' total terminated minutes for Local Traffic, excluding Local Traffic that is also Information Access Traffic, either Party may notify the other that mutual compensation will commence pursuant to the rates set forth in Appendix A of this Agreement and following such notice it shall begin and continue for the duration of the Term of this Agreement unless otherwise agreed. Local Traffic that is also Information Access Traffic will remain subject to Bill-and-Keep.

Arbitrator's Decision – Section 9.2.2 – The Arbitrator does not find it necessary to include Socket's language, but the section is factually correct so no harm is created by its inclusion. CenturyTel's language addresses bill and keep generally, which corresponds more closely with Socket's language at Sections 9.4.1 and 9.4.2. The Arbitrator cannot make a ruling on CenturyTel's language since it refers to a compensation arrangement contained in Appendix A which does not appear to be in the record.

Section 9.2.3

Petitioner (Socket) – Socket proposed no language on the section.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2.3 VNXX Traffic. If Socket assigns NPA/NXXs to a customer physically located outside of the CenturyTel Local Calling Area containing the rate center with which the NPA/NXX is associated, traffic originating from CenturyTel customers within that CenturyTel Local Calling Area to Socket customer physically located outside of the CenturyTel Local Calling Area, shall not be deemed Local Traffic but shall be at bill and keep (provided that Socket agreed to maintain the terms of the recent addendum agreement between CenturyTel and Socket whereby Socket agreed to place a POI at every CenturyTel end office and where all ISP-bound traffic is at bill and keep. Should Socket not agree to abide by its recent addendum terms, CenturyTel reserves the right to revert to its advocacy position on this issue which is that access charges do apply to all ISP-bound traffic that terminates to a physical ISP location outside of the local calling area.)

Arbitrator's Decision – Section 9.2.3 – The Arbitrator finds that CenturyTel's language is consistent with the ISP Remand Order and there is nothing prohibiting a bill and keep arrangement in that order. The language in the parenthetical is not consistent with the Arbitrator's position on the establishment of the POI and shall be eliminated.

Section 9.2.X and Section 9.2.XX – There is no disputed language.

Section 9.3

Petitioner (Socket) – Socket proposes the following language: 9.3 Non-MCA Traffic is all Section 251(b) (5) Traffic, ISP Traffic, Foreign Exchange Traffic including VNXX Traffic, and Transit Traffic that is not defined as MCA Traffic.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.3 – MCA traffic is specifically defined through the references to Case No. TO-92-306 and Case No. TO-99-483. By default all other traffic is “non-MCA” traffic. Socket’s language is not necessary.

Section 9.4

Petitioner (Socket) – Socket proposes the following language: 9.4 Compensation for Non-MCA Section 251(b) (5) Traffic, Non-MCA ISP Traffic and Non-MCA Foreign Exchange Traffic including VNXX Traffic.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.4 – This language is not necessary based on the decisions in Sections 9.4.1 and 9.4.2.

Section 9.4.1

Petitioner (Socket) – Socket proposes the following language: 9.4.1 All non-MCA Traffic, including Non-MCA Section 251 (b)(5) Traffic, Non-MCA ISP Traffic, Non-MCA Foreign Exchange Traffic including VNXX Traffic shall be exchanged on a Bill and Keep basis.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.4.1 – CenturyTel’s language at Section 9.2.3, addressing the appropriate application of bill and keep, is appropriate. Other traffic included in this section has been deemed non-local traffic through other determinations.

Section 9.4.2

Petitioner (Socket) – Socket proposes the following language: 9.4.2 “Bill and Keep” refers to an arrangement in which neither of two interconnecting parties charges the other for terminating FX traffic that originates on the other party’s network.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.4.2 – 47 CFR 51.713 defines bill-and-keep arrangements as those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier’s network. Socket’s language, with the removal of the reference to terminating FX traffic, is acceptable and consistent with this definition.

Section 9.5

Petitioner (Socket) – Socket proposes the following language: 9.5 The Parties may mutually agree to another compensation arrangement. In the event the Parties do mutually agree to another Intercarrier Compensation arrangement, the Parties will make the necessary amendment to the Interconnection Agreement to include that arrangement in the Agreement.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

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Arbitrator's Decision – Section 9.5 – This is a requirement of 4 CSR 240-3.513 and unnecessary for inclusion in this agreement.

Section 9.6

Petitioner (Socket) – Socket proposes the following language: 9.6 Compensation for Termination of Non-PIC'd IntraLATA Interexchange Toll Traffic.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.6 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Section 9.6.1

Petitioner (Socket) – Socket proposes the following language: 9.6.1 IntraLATA Interexchange Traffic that is carried on jointly provided LEC-to-LEC network is considered as IntraLATA Toll Traffic and is subject to tariffed access charges. Billing arrangements are outlined in Section 10 – Recording and Billing of this Article.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision - Section 9.6.1 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Section 9.6.2

Petitioner (Socket) – Socket proposes the following language: 9.6.2 Compensation for the termination of this traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including Carrier Common Line (CCL) charge, as set forth in each Party's intrastate access tariff(s).

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.6.2 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Section 9.6.3

Petitioner (Socket) – Socket proposes the following language: 9.6.3 For interstate IntraLATA service compensation for terminating of Intercompany traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including the Carrier Common Line (CCL) charge, as set forth in each Party's interstate access service tariffs or interstate price sheet.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 9.6.3 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Issue 11 – What are the appropriate rates, terms and conditions for compensation for transit traffic?

Petitioner (Socket) – Socket proposes the following language: 10.0 TRANSIT TRAFFIC

Respondent (CenturyTel) – CenturyTel proposes the following language: 10.0 The Parties will provide Tandem Switching for Local Traffic between the

Parties' end offices subtending each other's access Tandem, as [in the following subsections].

Arbitrator's Decision – Section 10.0 (and the proceeding subsections) – The Missouri Public Service Commission has already decided that transiting is a §251 obligation. In the Final Arbitrator's Report in Case No. TO-2005-0336, the Commission ruled that transiting is a §251 obligation quoting its Chariton Valley Order where the Commission determined that “transit service falls within the definition of interconnection service . . . [b]ecause the transit agreement is an interconnection service, it must be filed with the Commission for approval.” The Arbitrator concludes that the Act, at §251(c)(2) and at § 251(a)(1) obligates CenturyTel to receive transit traffic from Socket. Because transit traffic is an obligation imposed on CenturyTel pursuant to §§251(c)(2) and (3) of the Act, the applicable pricing standard is TELRIC. This allows Socket to effect an indirect interconnection with other carriers, which is expressly authorized by § 251(a)(1) of the Act.

Issue 12 – Should the parties agree to trunking, forecasting, availability of facilities, and requirements prior to exchanging traffic?

Section 11.0 – No disputed language in this section.

Section 11.1

Petitioner (Socket) – Socket proposes the following language: 11.1 Trunking Requirements: The interconnection of Socket and CenturyTel networks shall be designed to promote network efficiency. CenturyTel will not impose any restrictions on Socket that are not imposed on its own traffic with respect to trunking and routing options afforded to Socket. In accordance with Article III, it will be necessary for the Parties to have met and discussed trunking, forecasting, availability and requirements in order for the Parties to begin exchange of traffic.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.1 Trunking Requirements: In accordance with Article III, it will be necessary for the Parties to have met and agreed on trunking, forecasting, availability and requirements in order for the Parties to begin exchange of traffic.

Arbitrator's Decision – Section 11.1 – 47 CFR 51.305(a)(3) requires CenturyTel to provide interconnection at a level of quality that is equal to that which the ILEC provides itself, a subsidiary, an affiliate, or any other party. Socket's language is consistent with this requirement.

Issue 13 – Where available, should there be a preference for two-way trunks?

Section 11.1.1

Petitioner (Socket) – Socket proposes the following language: 11.1.1 The Parties agree to establish trunk groups of sufficient capacity from the interconnecting facilities such that trunking is available to any switching center designated by either Party, including end offices, tandems, and 911 routing switches. Where available, the Parties will use two-way trunks for delivery of Local Interconnection Traffic, or either Party may elect to provision its own one-way trunks for delivery of Local Interconnection Traffic to the other Party. If a Party elects to provision its own one-way trunks, when two-way trunking is available, that Party will be responsible for its own expenses associated with the trunks. If two-way trunking is not available,

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the Parties shall use one-way trunking for the exchange of Local Interconnection Traffic and each Party will be responsible for its own expenses associated with its own one-way trunks.

Respondent (CenturyTel) – CenturyTel proposes the following language:
 11.1.1 The Parties agree to establish trunk groups of sufficient capacity from the interconnecting facilities such that trunking is available to any switching center designated by either Party, including end offices, tandems, and 911 routing switches. The Parties will mutually agree where one-way or two-way trunking will be available. The Parties may use two-way trunks for delivery of Local Traffic, or either Party may elect to provision its own one-way trunks for delivery of Local Traffic to the other Party. If a Party elects to provision its own one-way trunks, that Party will be responsible for its own expenses associated with the trunks.

Arbitrator's Decision – 47 CFR 51.305(f) requires an ILEC, if technically feasible, to provide two-way trunking upon request. Socket's language is most consistent with this requirement.

Issue 14 – Should the agreement contain definitive trunking requirements? If so, what trunking requirements should the agreement contain?

Section 11.1.2

Petitioner (Socket) – Socket proposes the following language:

11.1.2 The parties shall establish trunk group as follows:

11.1.2.1 The Parties shall make available to each other two-way trunks (where available) for the reciprocal exchange of combined 251(b)(5) Traffic, ISP Traffic, Foreign Exchange Traffic, Transit Traffic, and non-PIC'd or non-equal access IntraLATA toll traffic. In the event two-way trunking is not available, each party will route combined 251(b)(5) Traffic, ISP Traffic, Foreign Exchange Traffic, Transit Traffic, and non-PIC'd or non-equal access IntraLATA toll traffic on one-way trunk groups.

11.1.2.1.1 Where Socket Offers Service for the exchange of Local Interconnection Traffic in an LCA that is not within an MCA, Socket shall establish dedicated trunking to each End-Office that is not a Remote End-Office in that LCA when forecasted or actual traffic volumes exceed 24 DS0s at peak.

11.1.2.1.2 Where Socket Offers Service for the exchange of Local Interconnection Traffic in an LCA that is within an MCA, Socket shall establish dedicated trunking to Local Tandem or to a single End-Office that is not a Remote End-Office within the MCA when forecasted or actual traffic volumes exceed 24 DS0s at peak.

11.1.2.1.3 Additional Dedicated Trunking may be established by mutual agreement of the Parties.

11.1.2.2 Meet Point Traffic will be transported between the CenturyTel Access Tandem Switch and Socket over a "meet point" trunk group separate from the Local Interconnection Trunk Groups. This trunk group will be established for the transmission and routing of Exchange Access traffic (InterLATA and IntraLATA Toll Traffic routed via an IXC) between end users of one Party attempting to use an interexchange carriers connected to the other Party's Switch. If CenturyTel has more than one Access Tandem Switch within a Local Exchange Area, Socket may utilize a single "meet point" trunk group to one CenturyTel Access Tandem Switch

within the Local Exchange Area in which Socket homes its NPA/NXXs. This trunk group will be provisioned as two-way and will utilize SS7 protocol signaling. Traffic destined to and from multiple IXCs can be combined on this trunk group.

11.1.2.3 Separate Trunks will be utilized for connecting Socket's switch to the POI and ultimately to each 911/E911 tandem or selective router. This trunk group will be set up as a one-way outgoing only and will utilize SS7 protocol unless SS7 protocol signaling is not yet available, then CAMA/ANI MF signaling will be utilized.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.1.2 Socket and CenturyTel shall, where applicable, make reciprocally available, by mutual agreement, the required trunk groups to handle different traffic types. Socket and CenturyTel will support the provisioning of trunk groups that carry combined or separate Local Traffic. CenturyTel requires separate trunk groups from Socket to originate and terminate Non-Local Traffic calls and to provide Switched Access Service to IXCs.

Arbitrator's Decision (Issue 14) – Commission rule 4 CSR 240-29.050 outlines the requirements for establishing trunking. CenturyTel's language is most consistent with this provision of the Commission's Enhanced Records Exchange Rule.

Issue 15 – Should the parties be required to mutually agree on one point of interconnection in each CenturyTel local calling area?

Petitioner (Socket) – Socket proposed no language on this issue.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.1.3.1 As stated in 4.2, the Parties will mutually designate at least one POI on CenturyTel's network within each CenturyTel local calling area to which Socket exchanges 24 DS0s worth of traffic at peak over three consecutive months, for the routing of Local Traffic.

Arbitrator's Decision – The parties should not be required to mutually agree on the establishment on one POI in each CenturyTel local calling area. CenturyTel's language is not consistent with the Arbitrator's decision on establishing POIs.

Issue 18 – Should CenturyTel's language regarding joint planning criteria that is already included in Article III be repeated in Article V.

Petitioner (Socket) – Socket proposed no language on this issue.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.4 Joint Trunk Planning Criteria. In order to facilitate sound and economical network planning and provisioning, the Parties agree to work cooperatively to establish appropriate: (i) fill factors for trunks previously deployed for the Socket; (ii) compensation arrangements to reflect CenturyTel's and the Socket's proportionate use of the trunking; (iii) strand plant or special construction termination charge to Socket for not utilizing the ordered trunking; and (iv) to establish appropriate time frames to reflect whether the Socket ordered trunking is Currently Available.

Arbitrator's Decision – CenturyTel 's language should not be repeated in Article V. Consistent with the Arbitrator's decision in Section 11.1 of this agreement, CenturyTel's language for planning and forecasting is not necessary and should not be included in the agreement.

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Issue 20 – Should this Article recognize that terminating carriers may rely on terminating records for billing the originating carrier?

Section 12.3 – There is no disputed language.

Section 12.3.3

Petitioner (Socket) – Socket proposes the following language: 12.3.3 The terminating carrier will use the originating and terminating caller identification numbers or Automatic Number Identification as defined in 4 CSR 240, 29.020(4) to determine the jurisdiction of the call.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 12.3.3 – Both parties are expected to adhere to the requirements of Chapter 29 of the Commission's rules, which specifically outline what is to be used to determine the jurisdiction of the call. Socket's language is not necessary in the Agreement.

Issue 21 – Should service ordering, provisioning, and maintenance standards be included in the interconnection agreement?

Petitioner (Socket) – Socket stated that its language, concerning these subjects, is addressed in the comprehensive OSS Article XIII and Article III.

Respondent (CenturyTel) – CenturyTel proposes the following language: 12.3 Service Ordering, Service Provisioning, and Billing. Except as specifically provided otherwise in this Agreement, service ordering, provisioning, billing and maintenance for non-access services shall be governed by the CenturyTel Service Guide. CenturyTel will provide Socket with advance notice of changes to CenturyTel's procedures as stated in the Service Guide and Socket has the right to raise a valid dispute under the terms of this agreement if a change materially affects Socket's service. If there is any variation in the terms of this agreement and the terms in CenturyTel's Service Guide, the terms of this agreement shall prevail.

Arbitrator's Decision – As much information as possible should be included in an interconnection agreement dictating the interactions and operations between parties. It is also reasonable for an ILEC to have guides or manuals to provide additional guidance to CLECs. CenturyTel's language is acceptable; however, CenturyTel is expected to provide clear and prompt notices of changes to its procedures consistent with the Arbitrator's decision in Article XIII - OSS.

Issue 24 – In the event one carrier is unable to provide meet-point billing data, should that carrier be held liable for the amount of unbillable charges?

Petitioner (Socket) – Socket proposes the following language: 1.3.1.8 If Meet-Point Billing Data is not processed and delivered by either CenturyTel or Socket within 30 days of the call date and, in turn, a Party is unable to bill the IXC for the appropriate charges, the Party who failed to deliver the data will be held liable for the amount of unbillable charges.

Respondent (CenturyTel) – CenturyTel proposed no language on this issue.

Arbitrator's Decision – Chapter 29 of the Commission's rules specifically identify actions to be taken when traffic data is not processed or delivered. The Arbitrator does not accept Socket's addition to Section 13.1.8.

Issue 26 – Should each party be required to pass calling party number (CPN) information to the other party?

Petitioner (Socket) – Socket proposes the following language: 16.2 Each Party will transmit call detail information to the other for each call being transited to or terminated on the other's network in compliance with the provisions of the Missouri Enhanced Records Exchange Rule; 4 CSR 240, Chapter 29.

For traffic that is not covered by that rule, including but not limited to meet-point traffic, each Party will include in the information transmitted to the other for each call being terminated on the other's network (where technically available to the transmitting party), the originating Calling Party Number (CPN). For all traffic originated on a Party's network including, without limitation, Switched Access Traffic, and wireless traffic, such Party shall provide CPN as defined in 47 C.F.R. § 64.1600(c) ("CPN"). Each Party to this Agreement will be responsible for passing on any CPN it receives from a third party for traffic delivered to the other Party. In addition, each Party agrees that it shall not strip, alter, modify, add, delete, change, or incorrectly assign any CPN. If either party identifies improper, incorrect, or fraudulent use of local exchange services (including, but not limited to PRI, ISDN and/or Smart Trunks), or identifies stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned CPN, the Parties agree to cooperate with one another to investigate and take corrective action.

Respondent (CenturyTel) – CenturyTel proposes the following language: 16.2 Each Party will transmit call detail information to the other for each call being terminated on the other's network, including calls that transit to the other from third party carriers, in compliance with the provisions of the Missouri Enhanced Records Exchange Rule; 4 CSR 240, Chapter 29, except that the obligation regarding transiting traffic is limited only to the unaltered transmission of call detail information as provided by the call originator.

For traffic that is not covered by that rule, each Party will include in the information transmitted to the other for each call being terminated on the other's network (where technically available to the transmitting party), the originating Calling Party Number (CPN). For all traffic originated on a Party's network including, without limitation, Switched Access Traffic, and wireless traffic, such Party shall provide CPN as defined in 47 C.F.R. § 64.1600(c) ("CPN"). Each Party to this Agreement will be responsible for passing on any CPN it receives from a third party for traffic delivered to the other Party. In addition, each Party agrees that it shall not strip, alter, modify, add, delete, change, or incorrectly assign any CPN. If either party identifies improper, incorrect, or fraudulent use of local exchange services (including, but not limited to PRI, ISDN and/or Smart Trunks), or identifies stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned CPN, the Parties agree to cooperate with one another to investigate and take corrective action.

Arbitrator's Decision – Section 16.2 – The Arbitrator finds Socket's language most acceptable. CenturyTel's language includes an exception to Chapter 29 of the Commission's rules that is not acceptable and is already addressed in "agreed-upon" language in the same section.

Section 16.3 – No disputed language.

Issue 31 – Should Socket's proposed language regarding the exchange of enhanced/information service traffic be included in the agreement?

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Petitioner (Socket) – Socket proposes the following language: 17.0 EXCHANGE AND COMPENSATION FOR IS TRAFFIC.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – Section 17.0 – Socket's language is not necessary based on the Arbitrator's decision on Section 17.1 below.

Section 17.1

Petitioner (Socket) – Socket proposes the following language: 17.1 Notwithstanding any other provision of this Agreement, the Parties shall exchange enhanced/information services traffic, including without limitation Voice Over Internet Protocol ("VOIP") traffic and other enhanced services traffic (collectively, "IS Traffic"), in accordance with this section. IS Traffic is defined as traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or traffic that features enhanced services that provide customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information.

The Parties shall exchange IS Traffic over the same interconnection trunk groups used to exchange local traffic. In addition to other jurisdictional factors the Parties may report to one another under this Agreement, the Parties shall report a Percent Enhanced Usage ("PEU") factor on a statewide basis or as otherwise determined by Socket at sole discretion. The numerator of the PEU factor shall be the number of minutes of IS Traffic sent to the other Party for termination to such other Party's customers. The denominator of the PEU factor shall be the total combined number of minutes of traffic, including IS Traffic, sent over the same trunks as IS Traffic. Either Party may audit the other Party's PEU factors pursuant to the audit provisions of this Agreement.

The Parties shall compensate each other for the exchange of IS Traffic applying the same rate elements used by the Parties for the exchange of ISP-bound traffic whose dialing patterns would otherwise indicate the traffic is local traffic. This compensation regime for IS Traffic shall apply regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Arbitrator's Decision – This issue has been addressed in previous sections of this Article. Socket's language will not be accepted by the Arbitrator as it conflicts with these previous determinations and previously offered language.

Issue 32 – How should the interconnection agreement define the term "Foreign Exchange"?

Petitioner (Socket) – Socket proposes the following language: 1.49 "Foreign Exchange (FX)" services are service offerings of local exchange carriers that are purchased by customers, which allow such customers to obtain exchange service from a mandatory local calling area other than the mandatory local calling area where the customer is physically located. Examples of this type of service include, but are not limited to, Foreign Exchange Service, CENTREX CUSTOPAK with Foreign Exchange Telephone Service Option, and ISDN-PRI Out-of-Calling Scope (both and Two-Way and Terminating Only).

Respondent (CenturyTel) – CenturyTel proposed no language on this issue.

Arbitrator's Decision – In Case No. TO-2005-0336, the Commission defined Foreign Exchange or "FX" as the industry term for calls that originate in one local exchange and terminate to another exchange that is not within the originating local calling scope, even though the originating end user dialed the number that looks like a local number. The Agreement shall contain this definition or no definition of FX service.

Issue 33 – How should the interconnection define "Local Interconnection Traffic"?

Petitioner (Socket) – Socket proposes the following language: 1.75 "Local Interconnection Traffic" shall mean for purposes of this Article, (i) Section 251(b)(5) Traffic, (ii) ISP Traffic, (iii) Transit Traffic, (iv) FX traffic (v) non-PIC'd IntraLATA Toll Traffic.

Respondent (CenturyTel) – CenturyTel proposes the following language: "Local Interconnection Traffic" shall mean for purposes of this Article, (i) Section 251(b)(5) Traffic, (ii) ISP-Bound Traffic, and (iii) non-PIC'd IntraLATA Toll Traffic.

Arbitrator's Decision – The Arbitrator finds CenturyTel's definition of local interconnection traffic most consistent with the intent of the ISP Remand Order.

Issue 34 – Which Party's definition of "Virtual NXX Traffic" is most appropriate?

Petitioner (Socket) – Socket proposes the following language: 1.132 Virtual NXX Traffic (VNXX Traffic) – As used in this Agreement, Virtual NXX Traffic or VNXX Traffic is defined as calls to or from a retail customer that uses a telephone number with an NXX Code (as set forth in the LERG) associated with a Rate Center that is different than the number and Rate Center the customer would received from a wireline carrier using the customer's residence or place of business.

Respondent (CenturyTel) – CenturyTel proposes the following language: 1.132 Virtual NXX Traffic (VNXX Traffic) – As used in this Agreement, Virtual NXX Traffic or VNXX Traffic is defined as calls in which a Party's Customer is assigned a telephone number with an NXX Code (as set forth in the LERG) assigned to a Rate Center that is different from the Rate Center associated with the Customer's actual physical premise location.

Arbitrator's Decision – CenturyTel's language is most clear in defining Virtual NXX traffic.

Article VI – Resale

Issue 34 – What resale rates should be included in the interconnection agreement?

Petitioner (Socket) – Socket argues that it bases its wholesale discount in the instant interconnection agreement(s) on the wholesale discount in the previous AT&T/GTE interconnection agreement. Socket argues that CenturyTel committed to "enter into agreements which have the same rates, terms, and conditions as those agreements previously negotiated with GTE" when it purchased the GTE exchanges.¹⁵

¹⁵ Kohly Direct, p. 95, line 21 – p. 96, line 1.

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Respondent (CenturyTel) – CenturyTel argues that it has produced a cost study for the wholesale discount ratio for Spectra and CenturyTel, producing a separate wholesale discount for each company. CenturyTel's witness Buchan argues this cost study is "[c]onsistent with CenturyTel's understanding of the method utilized by GTE and previously approved by this Commission".¹⁶ Buchan's study "utilized default avoidable cost ratios of 25% for product management and 90% for sales and product advertising expenses based on Alabama PSC Docket 25677."¹⁷ Buchan also states that "it is [his] understanding that GTE also utilized a ratio of 90% for sales and product advertising expenses in Missouri Case No. TO-97-63."¹⁸

Arbitrator's Decision – For avoided discount ratio(s), Buchan's study, on behalf of CenturyTel, uses Alabama PSC-approved ratios to determine certain costs that can be avoided.¹⁹ Kohly, on behalf of Socket, reruns the study with the Missouri-approved ratios from the GTE arbitration²⁰ to determine separate CenturyTel discounts. CenturyTel provides no justification for why the Alabama percentages should be acceptable in Missouri. There is no evidence in the record that Alabama costs are similar to Missouri costs. The choice seems to be between a 10-year old Missouri ratio and a more current, unsupported, Alabama ratio. Since the GTE ratio is the only ratio previously approved by this Commission, the Arbitrator finds in favor of Socket's position.

Article VII – Resale

Issue 13B – With respect to orders to convert other services, e.g., special access, to UNEs and vice versa, if CenturyTel has not developed an automated ordering process, should electronic service order charges nonetheless apply?

Petitioner (Socket) – Socket argues that to allow CenturyTel to charge a fee to pass on the costs of a manual process provides no incentive or an insufficient incentive for CenturyTel to move to electronic ordering processes."²¹ For this one particular class of orders, Socket proposes that CenturyTel charge an "Electronic Service Order charge" that would "reflect forward looking costs using efficient processes."²²

Respondent (CenturyTel) – CenturyTel argues that "a manual order service charge applies if the order is handled manually."²³ Further, CenturyTel argues that it currently processes these order manually,²⁴ and it is "entitled to recover its cost of providing that service."²⁵

¹⁶ Buchan Direct, p. 25, lines 3-4.

¹⁷ Buchan Direct p. 27, lines 5-6

¹⁸ Buchan Direct p. 27, lines 6-8.

¹⁹ Buchan Direct, p. 27, lines 5-6.

²⁰ Kohly Rebuttal, Pg 86, lines 14-15.

²¹ Kohly Direct, p. 100 lines 16-18.

²² Kohly rebuttal, p. 88, line 25 to p. 89, line 1.

²³ P. Hankins Direct, p. 22, line 10.

²⁴ P. Hankins Direct, p 22, line 17.

²⁵ P. Hankins Direct, p. 22, line 21.

Arbitrator's Decision – In the TRRO, the FCC recognized that conversions were largely a billing function. The FCC also noted that “[b]ecause incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges, [such as] [referencing] wasteful and unnecessary charges associated with establishing a service for the first time, are inconsistent with an incumbent LEC’s duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable and nondiscriminatory rates, terms and conditions.” Therefore Socket’s language is reasonable.

Issue 22 – How should the parties handle UNE requests that CenturyTel can not provide without expanding its facilities?

Petitioner (Socket) – Socket argues that to best serve its customers, it needs to know the reason why CenturyTel states it cannot provision a UNE. If the answer is “no facilities”, then Socket argues that CenturyTel should “submit a construction plan with a time line for adding capacity.”²⁶ Socket also argues that both parties should share the costs of this construction plan.

Respondent (CenturyTel) – CenturyTel argues that it has agreed to provide Socket a “reasonably detailed”²⁷ explanation whenever CenturyTel asserts it cannot provide a requested UNE. While CenturyTel argues it is willing to work with Socket with regard to a construction plan, Socket “must bear the cost of the engineering and construction of additional capacity specifically to meet Socket’s needs.”²⁸

Arbitrator's Decision – 47 CFR 51.307 (e) states that an incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC’s network facilities sufficient to allow the requesting carrier to achieve access to unbundled network elements consistent with the requirements of this section. Section 51.319 states that an ILEC shall provide routine network modifications to facilities that already exist. There is not an obligation to automatically build facilities to meet a competitor’s request. Therefore, CenturyTel’s language stating that Socket may request to work with CenturyTel to develop a construction plan is reasonable.

As for the costs of such facilities, neither party’s language is acceptable. CenturyTel inappropriately assigns all costs to Socket and Socket merely states CenturyTel will submit a plan to Socket and the Manager of the Commission’s Telecommunications Department. In Case No. TO-2001-455, the Commission found that “for the nonrecurring costs of constructing the interconnection, a 50/50 split is most equitable because both parties, and their customers, will benefit from the interconnection.”

Issue 35 – Should Article VII, Section 7.10.1 include a provision that, consistent with the FCC’s rules, imposes a cap of 10 on the number of unbundled DS1 dedicated transport circuits Socket may obtain on each route where DS1 dedicated transport is available on an unbundled basis?

Petitioner (Socket) – Socket argues that under paragraph 128 of the FCC’s TRRO, the cap of 10 unbundled DS1 circuits is relevant for transport routes where

²⁶ Kohly Direct, p. 102, lines 13-14.

²⁷ Busbee Direct, p. 8, line 6.

²⁸ Busbee Direct, p. 10, line 17-19.

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only DS1 transport is eligible to be unbundled (that is, where DS3 transport is not unbundled).²⁹ Socket argues that the Commission's ruling in the SBC M2A successor agreement arbitration between AT&T and then-SBC is consistent with its position in this case.³⁰

Respondent (CenturyTel) – CenturyTel argues that its language tracks precisely with the applicable DS1 transport cap rule, 47 CFR §51.319(e)(2)(ii)(B), which states that the 10 DS1 transport circuit cap applies “on each route where DS1 transport is available on an unbundled basis.”³¹ CenturyTel further argues that to accept Socket's language would mean that Socket would be “entitled to an unlimited number of DS1 dedicated transport circuits between CenturyTel's wire centers.”³²

Arbitrator's Decision – CenturyTel's language, with the exception of the reference to the “DS1 Threshold” mirrors the cap on DS1 transport found in 47 CFR 51.319(e)(2)(ii)(B). CenturyTel's language is accepted.

Article VIIA – UNE Pricing

Issue 1 – What UNE rates should be included in the ICA?

Petitioner (Socket) – Socket argues that the non-recurring rates it proposes are based on the rates resulting from the Commission's recent M2A successor agreement arbitration. Socket argues, in contrast, that the rates that CenturyTel proposes are: (1) different from the rates CenturyTel agreed to honor from the Commission's AT&T/GTE Arbitration;³³ and (2) not supported by any of CenturyTel's 19 submitted cost studies.³⁴ Socket also argues that in order to comply with past Commission decisions and FCC rules, it seeks deaveraging of DS1 and DS3 loop rates.³⁵

Respondent (CenturyTel) – CenturyTel argues that its proposed recurring charges for DS1 and DS3 loop rates are based on cost studies that are CenturyTel-specific, forward-looking and TELRIC compliant.³⁶ Furthermore, CenturyTel argues that their cost studies are based on engineering design and network assumptions that “are reasonable and forward-looking.”³⁷

Arbitrator's Decision – The only rates at issue in this arbitration are the DS1 and DS3 UNE loop rates.

As Mr. Turner points out on page 20 of his rebuttal testimony, for the vast majority of recurring rates, the parties agreed to utilize the Missouri-specific rates that were developed for Verizon in Missouri. Despite this agreement, CenturyTel proposed to use its newly calculated 2-Wire and 4-Wire Analog Loop cost studies as the basis

²⁹ Kohly Direct, p. 105, line 37 to p. 106, line 2.

³⁰ Kohly Direct, p/ 109, lines 1-3.

³¹ Busbee Direct, p.11, lines 6-10.

³² Busbee Rebuttal, p. 17, lines 16-18.

³³ Turner Direct p. 47, lines 16-18.

³⁴ Turner Direct, p 48, lines 22-23.

³⁵ Turner Direct, p. 58, lines 6-10.

³⁶ Buchan Direct, p 10, lines 15-21.

³⁷ David Direct, p. 4, lines 4-8.

for developing its DS1 and DS3 loop cost studies. The Arbitrator finds that CenturyTel cannot agree that a rate is appropriate and TELRIC-compliant in one instance and then claim it is not appropriate or TELRIC-compliant in another instance. CenturyTel will be ordered to rerun its cost studies using the agreed upon 2-Wire and 4-Wire Analog Loop costs in its DS1 and DS3 loop cost studies.

On page 17 of his direct testimony, Mr. Buchan states that CenturyTel discovered an error in its fill factor for copper facilities. This error should be corrected by rerunning the cost studies with the appropriate 2-Wire and 4-Wire Analog Loop rates. However, to the extent that this error is not corrected through this revision to the cost study, CenturyTel is directed to make the correction at the time the studies are rerun.

Similarly, Mr. Buchan, in his rebuttal testimony at page 15, notes that CenturyTel inadvertently utilized the wrong figure for fiber cost. Once again, this error should be corrected by rerunning the cost studies using the agreed upon 2-Wire and 4-Wire Analog Loop rates. However, to the extent that this error is not corrected through this revision to the cost study, CenturyTel is directed to make the correction at the time the studies are rerun.

CenturyTel is directed to file the revised DS1 and DS3 loop rates and supporting documentation by May 26, 2006. Both parties will have an opportunity to respond to the revised cost studies in their May 31 comment filings.

Article IX – Maintenance

Issue 1 – How should maintenance matters be communicated between the parties?

Petitioner (Socket) – Socket argues that its proposed Maintenance article is derived in large part from the Maintenance attachment that the Commission approved as reasonable and appropriate in Case No. TO-2005-0336, except that Socket has modified that attachment to reflect changes between CenturyTel's operations and those of SBC Missouri. Socket argues that these terms should be memorialized in the interconnection agreement, rather than left to CenturyTel to dictate unilaterally to Socket in a separate "guide." Socket further argues that this agreement is a contract between two parties and under general contract law, one party can not unilaterally amend the terms under which the parties operate by changes to a separate document that results in a change to the underlying contract.³⁸

Respondent (CenturyTel) – CenturyTel argues that not only does Socket demand performance beyond CenturyTel's legal obligation, its language would impose undue burdens that are in some respects not technically feasible, and are both onerous and expensive. CenturyTel argues that its obligation is to provide Socket nondiscriminatory, parity-based treatment, but certain Socket requirements would afford Socket superior treatment as compared to CenturyTel's treatment of its own orders for retail service (or the order of other CLECs).³⁹

Arbitrator's Decision – Based on the record, Socket may contact CenturyTel in order to discuss scheduled activities that may impact Socket customers,

³⁸ Bruemmer Direct at p.3-5 and Rebuttal.

³⁹ Scott Direct, p 3-10, and Rebuttal

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specifically when Socket has a customer with a service problem. CenturyTel should not be required to furnish Socket with all emergency outages. Socket's definition of "Emergency Network Outage" is not acceptable, specifically when an abnormal service condition is defined in Chapter 3. Nothing in an interconnection agreement should alleviate a company providing service in Missouri from its service and billing responsibilities found in Chapters 3, 32 and 33 of the Commission's rules. The record establishes that CenturyTel has provided Socket with a means of contacting CenturyTel for service-related questions without sitting in a queue with retail customers. The Arbitrator accepts CenturyTel's language in sections 4.1, 5.1 and 7.3. However, CenturyTel shall have a knowledgeable person available to respond to Socket's questions, although CenturyTel is not expected to assign an individual or team specifically to Socket. CenturyTel shall also comply with the requirements of 47 C.F.R 51.325 through 47 C.F.R. 51.335 as applicable.

Article XII – Number Portability

Issue 2 – How should remote call forwarding be addressed in the interconnection agreement?

Petitioner (Socket) – Socket argues that there is no legal or policy reason why telephone numbers associated with Remote Call Forwarding (RCF) service cannot be ported as part of LNP. Porting of RCF numbers is technically feasible, and it is common in the industry to provide for number portability of remote call forwarded numbers if the incumbent is offering the same service to its customers, as is the case here. Socket further argues that the LNP subcommittee of the North American Numbering Council found that number portability for this type of arrangement is entirely reasonable and ILECs across the country indicate they routinely provide this type of number porting. Therefore, Socket's proposed language is reasonable and should be approved.⁴⁰

Respondent (CenturyTel) – CenturyTel argues that the unequivocal dictate of prevailing precedent mandates rejection of Socket's proposed language. By demanding "number portability" for numbers subject to RCF, Socket effectively demands location portability, which is inappropriate. CenturyTel argues that while parties are entitled to number portability, they are not entitled to port numbers to different location that are not in the same rate center.⁴¹

Arbitrator's Decision – Section 251(b) of the Telecommunications Act requires local exchange carriers to provide local number portability (LNP), to the extent that it is technically feasible, in accordance with the requirements prescribed by the FCC. Local number portability is defined as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability or convenience when switching from one telecommunications carrier to another." Location portability is defined as the ability of an end user to retain the same number as he/she moves from one physical location to another. Through the testimony of Guy Miller, CenturyTel claims that Socket is effectively demanding location portability. Since the end user does not change physical locations, either for the originating number

⁴⁰ Turner Direct, p. 60-62 and Rebuttal.

⁴¹ Miller Direct p. 79-87 and Rebuttal.

or for the number to which the call is forwarded, Socket's request is clearly not location portability.

CenturyTel's tariff states that remote call forwarding will not be used for toll by-pass, does not allow further call forwarding from the remote call forwarded location and does not allow for calls to international locations. The tariff further states that the portion of the calls between the number designated to be a remotely call forwarded number and the answer location is subject to applicable interstate or intrastate charges. These are the terms to which the CenturyTel customer is familiar. Telephone numbers associated with remote call forwarding will be ported subject to these same terms and conditions. Socket will be responsible for paying any intrastate or interstate charges.

Article XIII – OSS

Issue 1 – Should the interconnection agreement contain an Article addressing Operations Support System issues?

Petitioner (Socket) – Socket argues that it is entitled to efficient and effective provisioning of wholesale facilities under CenturyTel's Section 251 obligations. Socket proposes that CenturyTel have an electronic OSS in place within 9 months of the Commission's order in this arbitration and that the OSS language be derived in large part from the OSS attachment that the Commission approved as reasonable and appropriate in Case No. TO-2005-0366, as modified, to reflect changes between CenturyTel's operations and those of SBC. Socket argues that these terms be memorialized in the interconnection agreement, rather than left to CenturyTel to dictate unilaterally to Socket.⁴²

Respondent (CenturyTel) – CenturyTel argues that Socket demands that CenturyTel implement electronic access to its OSS of the kind maintained by the RBOCs, including a "Real Time Electronic Interface." CenturyTel argues that current CLEC order volume does not justify the imposition of such an onerous requirement. CenturyTel further argues that it would cost millions, or tens of millions, of dollars to radically change its entire operation's organizational structure to implement Socket's request.⁴³

Arbitrator's Decision – The Arbitrator considered six factors in making a decision on this issue: (1) The obligation of CenturyTel to provide an OSS system requested by Socket based on the commitment of Ken Matzdorff in Case No. TM-2002-232; (2) The unanimous stipulation and agreement and Report and Order in Case No TM-2002-232 (In the Matter of the Joint Application of GTE Midwest, Ind., d/b/a Verizon Midwest and CenturyTel of Missouri, LLC, granting authority to acquire Verizon's Property in Missouri); (3) The volume of orders being processed by Socket and all CLECs in Missouri and all CenturyTel properties; (4) The cost to CenturyTel and all parties to implement and maintain an OSS system as requested by Socket; (5) Whether CenturyTel is providing service to Socket that is in parity with the service CenturyTel provides to its customers, affiliates and other CLECs; (6) Whether CenturyTel's Article XIII provides an avenue for Socket to do business with CenturyTel.

⁴² Turner Direct, p. 60-62 and Rebuttal.

⁴³ Wilkes Direct, p. 3-4 and p. 6-20. Moreau Direct, p. 8-10.

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Concerning provisions “(1)” and “(2)”, the Arbitrator reviewed the direct testimony of Steven E. Turner, pages 28-29, referencing the testimony of Ken Matzdorff in Case No. TM-2002-232 and compared it with the stipulation and agreement and Report and Order. Specifically, the Arbitrator reviewed section 6, subparagraph (B) of the stipulation which states: “CLECs understand and agree that the method currently used by CenturyTel to process service orders will be different from the method currently utilized by Verizon. CenturyTel agrees to make available at the time of transfer an internet-based e-mail service ordering system, and CLECs may choose between placing orders by facsimile or e-mail.” That being said, it was stipulated that the “CenturyTel agreed upon OSS” was not the OSS system Verizon had in place or the OSS system Socket is requesting in this arbitration. The Commission approved the stipulation on March 21, 2002.

Concerning provisions “(3)” and “(4)”, in the direct testimony of Maxine Laird Moreau, pages 9 and 10 and the rebuttal testimony of Carla Futch Wilkes on page 8, CenturyTel states the volume of transactions submitted through CSRs and LSRs by Socket is very low. Wilkes’ rebuttal testimony also states the volume of requests from all CLECs to all CenturyTel properties is also low. Socket did not rebut the fact in the hearing.

According to the cost studies referenced in the direct testimony of Maxine Laird Moreau, it would cost \$14 million to build and \$2 million annually to maintain the OSS system requested by Socket. The Arbitrator does not offer an opinion as to the appropriateness of the cost studies. Any OSS system that is ordered or implemented shall be subject to a complete cost case to allow the Commission, its Staff and any other interested parties the opportunity to review the appropriateness of the costs and associated inputs and to make adjustments as necessary. The appropriate cost recovery will be determined at that time.

Concerning provision “(5)” Mr. Kohly maintains that just because all CLECs are provided the same non-efficient ordering system doesn’t mean CenturyTel has met its requirement for parity. Likewise, just because CenturyTel does not have the same OSS system as other companies Socket interconnects with, does not mean it is not operating at parity. In its Triennial Review Order at paragraph 561, the FCC states, “OSS includes manual, computerized, and automated systems, together with associated business processes and the data maintained and kept current in those systems.” In paragraph 562, the FCC stated: “[a]ccordingly, we require incumbent LECs to continue to provide unbundled access to OSS. This requirement includes an ongoing obligation on the incumbent LECs to make modifications to existing OSS as necessary to offer competitive carriers nondiscriminatory access” Finally, at paragraph 566, the FCC stated: “[h]owever, we recognize the wide variety of systems and databases that comprise the OSS of incumbent LECs and the important role that state commissions have played in facilitating access to incumbent LEC OSS through the section 271 proceedings and other state proceedings . . . we expect that states will continue their important role in working with the incumbent LECs and competitive LECs to ensure that competitors obtain necessary access to the particular incumbent LEC OSS systems in each state for the qualifying services.”

Concerning provision “(6)”, the Arbitrator finds Socket can conduct business with CenturyTel, but also finds the efficiency at which the two companies interact is less than efficient.

Based on its review, the Arbitrator finds both parties' language unreasonable. CenturyTel's language meets the minimal commitments in Case No. TM-2002-232. Language resolved in other Articles indicates Socket's acceptance and CenturyTel's ability to provide a more mechanized system where correspondence is delivered via fax, e-mails or phone calls. It is questionable as to how mechanized a process is needed when Socket has the ability to review its invoices from CenturyTel on-line and has yet to utilize that automated system. Similarly, it is questionable as to the efficiency offered by CenturyTel when its witnesses testify that orders are received electronically, but CenturyTel representatives take that information and manually key the data into its systems.

As previously stated, the FCC has provided guidance on this issue. In its TRO, the FCC noted that there are varying degrees of OSS and state commissions are to facilitate necessary access to ILEC systems. Therefore, the Arbitrator directs the parties to develop language acknowledging that CenturyTel will provide electronic notification as agreed upon in other Articles (without simply referencing the Article). The Arbitrator further directs the parties to develop language and a process that allows for the electronic information to be incorporated in CenturyTel systems without the need for manual intervention. This incorporation does not require real time updates or extensive system overhauls. Finally, the Arbitrator encourages the parties to continue to work to develop a more extensive OSS system through the assistance of additional commission proceedings and involving any interested, potentially affected, parties.

Article XV: Performance Measures and Provisioning Intervals

Issues 1-5 – Should Article XV provide for performance measures and remedies?

Petitioner (Socket) – Socket argues that it is entitled to interconnection that is at least equal in quality to that provided by CenturyTel to itself and any other interconnecting party. Article XV lays out expectations concerning CenturyTel's provision of quality wholesale service to Socket, so that Socket in turn may provide quality, timely service to its customers. Socket urges the Commission to order the parties to hold a collaborative process to work out the details of the performance measures.⁴⁴

Respondent (CenturyTel) – CenturyTel argues that Socket is demanding that the Commission impose performance measures and a remedy plan far in excess of that which would reasonably conform to any conceivable risk that CenturyTel will fail to perform in its obligations under the agreement. CenturyTel argues that it has offered a reasonable set of performance measures to satisfy Socket that the standards of the contract will be upheld.⁴⁵

Arbitrator's Decision – Yes. In its Triennial Review Order the FCC stated at paragraph 456 as follows:

⁴⁴ Kohly Rebuttal, p. 113-122, 126; Kohly Direct, p. 111-112; Turner Direct, p. 3-9.

⁴⁵ Moreau Direct, p 18-27, Rebuttal, p. 3 and Direct Schedule D; P. Hankins Rebuttal.

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Operational Criteria. In order to rebut the Commission's finding of no impairment as it relates to operational barriers, the states must examine whether operational factors are impairing competitors, according to our impairment standard discussed above. In particular, state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs. We believe, based on the large record in this proceeding, that these factors can raise barriers to entry. We lack, however, sufficient specific evidence concerning whether and where they will be significant enough to constitute impairment. We therefore ask state commissions to consider evidence, which could include performance metrics and standards for BOCs or other types of evidence for non-BOC incumbent LECs, of whether these factors are impairing entrants in the enterprise market, and whether unbundling will overcome this impairment.

Continuing at paragraph 489, the FCC stated:

Specifically, state commissions may require that incumbent LECs comply with an average completion interval metric, including any further disaggregation of existing loop performance metrics (i.e., quality or maintenance and repair metrics), for provisioning high volumes of loops."

The FCC has established framework for the Commission to direct the parties to establish performance metrics. Contrary to CenturyTel's claims, it only follows that to make such performance metrics effective, remedies need to be established and enforced.

The Arbitrator notes that the issue statement is too broad to rule on either party's position and necessarily will address each Section of the interconnection agreement language in ruling on these issues. Because much of this section was developed without any consensus between the parties, in some instances the Arbitrator was forced to take provisions from both parties' proposals in an effort to reach fair and meaningful performance measures

Section 1.0 – There is no disputed language

Section 1.1 – CenturyTel's language contains an expectation that CLECs will bear the costs for developing and implementing new business processes. This issue was decided in Article XIII - OSS. Therefore, CenturyTel's language is not appropriate and shall be rejected.

Section 1.2 – The Triennial Review Order contemplates performance measures being applicable to incumbent local exchange carriers. CenturyTel's language extends this obligation to Socket. Socket's language references other measures in the Agreement. There does not appear to be a requirement for PMs

to also apply to CLECs. The Arbitrator has already determined that cross-references will not be allowed for disputed language since both parties object to cross-references in various issues and Articles. Socket's language is more appropriate with the references in bold removed.

Section 1.2.1 – The language that CenturyTel offers as this subsection to 1.2 is already addressed in Section 1.2 and is not necessary. Socket offers no language under this separately numerated section.

Section 1.3 – There is no disputed language

Section 1.3.1 – There is no disputed language

Section 1.3.2 – Despite the differences in the proposed language that CenturyTel offers, the only apparent difference in the language offered by the parties is the phrases "received by CenturyTel", submitted by CenturyTel, and the phrase "Submitted by Socket", submitted by Socket. Since the time stated is expressed as "received", CenturyTel's language is most consistent with other provisions in the agreement.

Section 1.3.3 – In CenturyTel's language, "Good Faith" is a subjective term that is not defined and not agreed upon. Further, if something is "inconclusive", it can not be measured by Socket. Therefore, CenturyTel's language is rejected.

Section 2.0 - In other Articles, CenturyTel objected and the Arbitrator agreed that CenturyTel would not be required to designate a team coordinator. Socket's language is most appropriate to this decision.

Section 2.1 – The only distinction between the parties' language is discussed under Section 2.0. See discussion under Section 2.0.

Section 2.2 – The only distinction between the parties; language is discussed under Section 2.0. See discussion under Section 2.0.

Section 3.0 – The only disputed language appears to be "one or more" versus "a" particular performance measure and "15" versus "20" business days. CenturyTel's language is acceptable with the removal of, "is requested" since the agreed upon language already implies a gap closure plan will be requested.

Section 3.1 – Socket's language provides definite guidelines so it is the appropriate language to be included in the interconnection agreement.

Section 3.1.1 - The issue statement is too broad to rule on either party's position. CenturyTel is responsible for its own performance. Socket should not be required to propose steps, processes and/or methodology for correcting CenturyTel's performance. Therefore, Socket's language is most appropriate.

Sections 3.1.2 and 3.1.3 – There is no disputed language.

Section 3.1.4 – Socket's language is most appropriate since it includes definite standards.

Section 3.1.5 – There is no disputed language.

Section 3.2 – Socket's language is most appropriate since it has timetables for all tasks and involves both parties approving the plan. Socket's language also provides more of an incentive not to reach this stage of the performance measurement process.

Sections 3.3, 3.4 and 4.0 – There is no disputed language.

Section 4.1 – Socket's proposed dollar amounts provide an incentive for CenturyTel to operate efficiently and without imposing barriers to entry for competi-

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tors. Socket's "30 day" language provides a definitive timetable and is appropriate. CenturyTel's language that penalties shall be in the form of a credit or direct payment is acceptable, but the method of payment shall be at Socket's discretion.

Sections 4.2, 4.3, 4.3.1, 4.3.2, and 4.3.3 – These Section are addressed in Section 4.1

Section 4.4 – CenturyTel's language is agreed upon language except it is also made applicable to Socket. Consistent with the Arbitrator's decision in Section 1.2, the reference to Socket shall be removed. Socket's language includes cross-references that the Arbitrator has already determined will not be included when disputed.

Section 4.5 – CenturyTel's language is unnecessary, because "parity" will be dealt with in language for specific PM sections.

Section 4.5.1 – Without specifics as to the length of a "transition period", CenturyTel's language is not appropriate and should be rejected.

Section 4.5.2 – CenturyTel's language is not appropriate. Its performance should be acceptable regardless of the number of orders received. CenturyTel claims that Socket only submits a small number of orders when it is to CenturyTel's advantage, but then claims Socket's position is not appropriate in other sections because the interconnection agreement is adoptable by other CLECs, thus expanding CenturyTel's obligations beyond its dealings with just Socket. Therefore, the Arbitrator directs both parties to come up with language that will allow for a statistically significant sample to be determined over a period of months without referencing or considering the "small" amount of orders currently processed.

Section 4.6 – The requirement for forecasts was determined in Article V. This Performance Measure does not accurately reflect that decision and will be rejected.

Sections 4.6.1, 4.6.2 and 4.6.3 – Addressed in Section 4.6

Section 4.7 – CenturyTel's language is not appropriate. Terms of the PMs have been addressed in other sections.

Issue 7 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Prompt Transmission of Manually Requested Customer Services Record (CSR) – Retail?

Petitioner (Socket) – Socket argues that access to CSR is essential to a CLEC's ability to compete and is a key aspect of ILEC performance. Performance Measures, in this area, will apply as long as CenturyTel has no electronic OSS as it is a flag that action needs to be taken to improve the service that Socket is receiving.⁴⁶

Respondent (CenturyTel) – CenturyTel argues that this benchmark is inappropriate since Socket can show few, if any, instances where CenturyTel fails to meet its obligations under the existing contract. Further, the CSR information is from several different systems and interpreted by CenturyTel prior to being sent to Socket; an extremely time-consuming process. Finally, CenturyTel argues that staffing is based on historical factors and any significant increase in activity will affect its ability to meet a benchmark.⁴⁷

⁴⁶ Socket's preliminary position. Final DPL Article XV.

⁴⁷ Moreau Direct, p. 28-30.

Arbitrator's Decision – Consistent with the Arbitrator's decision in Article XIII - OSS, CenturyTel must modify its systems/processes in such a way that there is little to no delay between Socket's "submission" and CenturyTel's "receipt" of an order. Waiving charges does not provide sufficient incentive to improve performance. The Arbitrator finds Socket's language most appropriate. However, section 3.2 (agreed to by both parties) defines a business day as 9 business hours (8 am - 5 pm) the parties are directed to change "8 business hours" in Remedy Two to "9 business hours".

Issue 8 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Erroneously Rejected Requests for CSRs?

Petitioner (Socket) – Socket states that it appears the parties agree that this measure should be included but that CenturyTel is imposing a requirement to reverse previously agreed upon language.⁴⁸

Respondent (CenturyTel) – CenturyTel argues that this benchmark should not be implemented until Socket demonstrates that CenturyTel's performance under this agreement indicates a need. CenturyTel argues that it takes its obligations under the FCC's CPNI rules seriously and that Socket should not be able to profit where CenturyTel is just complying with these rules.⁴⁹

Arbitrator's Decision – Socket's language is acceptable. CenturyTel's "good faith basis" language is subjective and not defined. As long as CenturyTel identifies the errors that created the rejection and does not reject for inconsequential, obvious errors such as an order stating "Clark Ave." instead of "Clark Avenue", its concerns regarding this PM are frivolous.

Issue 9 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Erroneous Orders?

Petitioner (Socket) – Socket argues that CenturyTel is imposing a performance measurement on Socket without any discussion or justification. Socket states that it is inappropriate to penalize it for errors that are caused by information CenturyTel provides.⁵⁰

Respondent (CenturyTel) – CenturyTel argues that its ability to respond to Socket in a timely manner is significantly influenced upon its receipt of accurate and complete orders from Socket. CenturyTel argues that inclusion of this benchmark directly affects its ability to perform at parity and to meet the requirements of the agreement.⁵¹

Arbitrator's Decision – CenturyTel's language is not appropriate. The Triennial Review Order anticipates PMs for incumbent's. There does not appear to be a requirement for PMs to also apply to CLECs. Further Socket already has an incentive to submit orders accurately.

⁴⁸ Kohly Rebuttal, p. 125.

⁴⁹ Moreau Direct, p. 30-33

⁵⁰ Kohly Rebuttal, p. 125-126.

⁵¹ Moreau Direct, p. 63.

Issue 10 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Prompt Transmission of Electronically Requested Customer Service Record?

Petitioner (Socket) – Socket argues that it is entitled to interconnection that is at least equal in quality to that provided by CenturyTel to itself or any other interconnecting party. Article XV lays out expectations concerning CenturyTel's provision of quality wholesale service to Socket, so that Socket in turn may provide quality, timely service to its customers. Socket urges the Commission to order the parties to hold a collaborative process to work out the details of the performance measures.⁵²

Respondent (CenturyTel) – CenturyTel argues that the benchmark is not defined by Socket and that the benchmark is unnecessary until such time as an OSS is developed and there is some CenturyTel failure that would make the PM necessary.⁵³

Arbitrator's Decision – Socket's language is not appropriate based on the Arbitrator's decision in Article XIII - OSS.

Issue 11 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Erroneous Manual Orders Rejected within 9 Business Hours?

Petitioner (Socket) – Socket argues that this PM is necessary because it is important that its orders for service are completed in a timely manner and not rejected in error.⁵⁴

Respondent (CenturyTel) – CenturyTel argues that any reference to “electronically submitted” be rejected unless referring to the existing web interface, that manual orders cannot be processed on a consistent schedule as proposed and that Socket could game the system by filling the system with erroneous orders.⁵⁵

Arbitrator's Decision – This issue will be resolved using portions of each party's language. a) CenturyTel's language as far as the 9 business hour duration is most appropriate and agreed upon in other sections of the interconnection agreement. b) Socket's payment information is accepted as there is no incentive to correct errors through the waiving of expected charges.

Issue 12 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to percent Firm Order Confirmations (FOCs) Returned on Time for LSR and ASR Requests?

Petitioner (Socket) – Socket states that it appears that CenturyTel agrees to this PM; however, CenturyTel revises Socket's proposal to add exclusions that were not contemplated in the original PM and were not thoroughly reviewed, discussed and defined.⁵⁶

⁵² Kohly Rebuttal at 113-120; Turner Direct at 3-9; Kohly Direct at 111-112; Kohly Rebuttal at 120-122, 126

⁵³ Moreau Direct at 33-34.

⁵⁴ Socket Preliminary Position. Final DPC Article XV: performance Measures and Provisioning Intervals.

⁵⁵ CenturyTel Preliminary Position. Final DPL Article XV: Performance Measures and Provisioning Intervals

⁵⁶ Kohly Rebuttal at 126.

Respondent (CenturyTel) – CenturyTel argues that Socket has proposed a measurement that includes services that are; not provided according to the agreement, but applicable to tariffed access services; does not consider the difference between simple and complex orders; does not consider the accuracy of Socket's orders; and does not consider that orders require a manual "scrub". CenturyTel argues its proposed standard is in parity with its practices for its retail end-users.⁵⁷

Arbitrator's Decision – CenturyTel's language allows extra time to perform a manual scrub of the information. This requirement will be eliminated through the electronic solution as directed in Article OSS. Socket's timeframe and penalty language are acceptable.

Issue 13 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to ASRs and LSRs erroneously rejected?

Petitioner (Socket) – Socket argues that this PM is appropriate if the agreement contains performance measures.⁵⁸

Respondent (CenturyTel) – CenturyTel argues there is no demonstrated need for this benchmark since no order is rejected without providing a reason. CenturyTel also argues that Socket does not define "erroneously" and does not consider the accuracy of its own orders.⁵⁹

Arbitrator's Decision – Socket's language is acceptable as it defines "erroneously rejected" as "no accurately listed or identifiable errors listed on the reject notice". As long as CenturyTel identifies the errors that created the rejection and does not reject for inconsequential, obvious errors such as an order stating "Clark Ave." instead of "Clark Avenue", its concerns regarding this PM are moot.

Issue 14 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Accurate Order Forecasts?

Petitioner (Socket) – Socket strongly opposes any performance measures that would apply to it; therefore, Socket argues that this measure should be rejected in total.⁶⁰

Respondent (CenturyTel) – CenturyTel is proposing a benchmark requiring that Socket submit accurate order forecasts in order for CenturyTel to accurately staff to meet the benchmarks and intervals contained in the agreement.⁶¹

Arbitrator's Decision – This issue was decided in Article V with respect to what is required for forecasting. Therefore, CenturyTel's language is inappropriate and is rejected.

⁵⁷ Moreau Direct at 36-39.

⁵⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁵⁹ Moreau Direct at 40-41.

⁶⁰ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶¹ Moreau Direct at 63-64.

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Issue 15 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percentage of Orders where Due Date is missed where Socket received a jeopardy notice prior to Due Date being missed?

Petitioner (Socket) – Socket argues this PM is necessary because customers expect to receive service on the date promised and Socket cannot make firm commitments to its customers if it cannot depend on CenturyTel to meet the service provisioning intervals to which the Parties agreed.⁶²

Respondent (CenturyTel) – CenturyTel argues that this PM requires it to develop systems to capture data, track performance and demonstrate that the measurement is based on parity.⁶³

Arbitrator's Decision – Socket claims that parity needs to be measured based on a carrier to carrier, not carrier to retail customer basis, but its language would have CenturyTel demonstrate parity based on a carrier- to-retail basis. As some requirement to provide a jeopardy notice before an install date is missed is appropriate, and CenturyTel presents no alternative, Socket's language is appropriate.

Issue 16 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Line Loss Notification returned within One Business Day of Work Completion?

Petitioner (Socket) – Socket argues that it is vital for CLECs to know as soon as possible that end users can be billed correctly and that it appears CenturyTel agrees with this PM and remedy plan.⁶⁴

Respondent (CenturyTel) – CenturyTel does not object to the benchmark provided that it is clarified that there are “nine business hours” or “one business day”. However, CenturyTel states that Socket's definition of this PM is not clear.⁶⁵

Arbitrator's Decision – This issue will be resolved using portions of each party's proposals as follows: a) CenturyTel's definition of “a late line loss notification” is reasonable and accepted. b) As defined in section 3.2, a business day is 9 hours, not 8 hours. Socket's benchmark language is accepted, with the benchmark changed to 9 business hours.

Issue 17– Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Due Date Commitments Met?

Petitioner (Socket) – Socket argues that meeting due date commitments is critical to a CLECs' ability to provide timely, high quality service.⁶⁶

⁶² Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶³ Moreau Direct at 41-44.

⁶⁴ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶⁵ Moreau Direct at 44-45.

⁶⁶ Socket's Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

Respondent (CenturyTel) – CenturyTel argues that many of the measures associated with provisioning retail circuits are unreasonable or unlawful.⁶⁷

Arbitrator's Decision – This issue will be resolved using portions of each party's proposal as follows: a) Socket's 90% assumption is more likely to cause CenturyTel to develop its own track system to truly prove what parity is in this case. Socket's percentage is thus accepted. b) With respect to CenturyTel's proposed additional exclusions: (i) appears to be reasonable and is accepted; (ii) does not appear to be reasonable and is not accepted. c) Socket's language regarding the remedy is the accepted remedy.

Issue 18 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Average Delay Days for CenturyTel Caused Missed Due Dates?

Petitioner (Socket) – Socket argues that this PM is necessary to show how great a delay Socket and its customers are experiencing with respect to CenturyTel's provisioning of a service order.⁶⁸

Respondent (CenturyTel) – CenturyTel argues that this PM is not necessary because missed due dates have already been addressed in PM 1 and it would be required to develop systems to capture data and track performance by type of service for all Socket orders.⁶⁹

Arbitrator's Decision – The Arbitrator agrees with CenturyTel's analysis that this PM is already covered in PM 1.1. Therefore, Socket's language is not appropriate and will be rejected.

Issue 19 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Trouble Reports Within 30 Days of Installation?

Petitioner (Socket) – Socket argues that this measure is necessary to reveal whether the services CenturyTel provisions are working properly at the time of installation or whether trouble develops after service provisioning.⁷⁰

Respondent (CenturyTel) – CenturyTel argues that this PM suffers from Socket's small sample size/low volume order and is not necessary until Socket demonstrates there is a problem.⁷¹

Arbitrator's Decision – This issue will be resolved using portions of each party's position as follows: a) the parties appear to agree on a 94% benchmark; b) the Arbitrator agrees with CenturyTel that a "per DS0" benchmark is overreaching; therefore, the Arbitrator accepts CenturyTel's language under "measurement" in section 2.3; c) the Arbitrator adopts Socket's "Rules and Definitions" section over CenturyTel's "Rules and additional terms" section for this PM, as CenturyTel's "Exceptions" are overreaching; d) the Arbitrator accepts Socket's remedy language, for reasons stated above.

⁶⁷ Moreau Direct at 46-49.

⁶⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶⁹ Moreau Direct at 49-51.

⁷⁰ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷¹ Moreau Direct at 51-53.

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Issue 20 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Number Port Using Ten Digit Trigger (TDT)?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷²

Respondent (CenturyTel) – CenturyTel argues that this PM is unnecessary because Socket presently requests coordinated hot cuts for all ports and the times are not consistent with Article XII agreed upon language.⁷³

Arbitrator's Decision – In Section 5.1.1.2 of Article XII - Number Portability, the parties agree to “set” the 10-digit unconditional trigger not later than “11:59 pm on the day before the scheduled date”. Socket’s PM is accepted, but the language will state, “The TDT-LNP related conversion where CenturyTel fails to set the 10-digit unconditional trigger by 11:59 p.m. on the day before the scheduled due date for the number port will occur less than 3.5% of the time.”

Issue 21 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Coordinated Hot Cuts (CHC)?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷⁴

Respondent (CenturyTel) – CenturyTel argues the PM should be limited to coordinated hot cuts where the customer experiences minimal down time and the language should be applicable to both parties since number portability is an obligation applicable to both parties.⁷⁵

Arbitrator's Decision – The only meaningful difference in the parties’ proposals is the benchmark percentage. Socket states its percentage is based on the SBC post-M2A interconnection agreements. CenturyTel provides no basis for its benchmark. Therefore, Socket’s language is accepted since it is based on previously approved Commission benchmarks.

Issue 22 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Trouble Reports?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷⁶

Respondent (CenturyTel) – CenturyTel argues Socket’s proposal is inappropriate for three reasons: 1) the metric is not designed to produce a fair and accurate measurement of trouble reports; 2) the exclusions are too narrow; and 3) the remedy could result in an excessive penalty.⁷⁷

⁷² Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷³ Moreau Direct at 53-54.

⁷⁴ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷⁵ Moreau Direct 54-56.76

⁷⁶ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷⁷ Scott Direct at 12-15.

Arbitrator's Decision – Socket's language is accepted by the Arbitrator. If CenturyTel is concerned that Socket's language will include problems "beyond CenturyTel's control", CenturyTel is free to elect the parity measure.

Issue 23 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percentage of Repair Commitment Met?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷⁸

Respondent (CenturyTel) – CenturyTel argues Socket's proposal is inappropriate for three reasons: 1) the metric is not limited to repair commitments for out of service trouble; 2) the exclusions from the measured data is too narrow; 3) the remedy could result in an excessive penalty.⁷⁹

Arbitrator's Decision - Socket's language is appropriate, see Issue 22.

Issue 24 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Mean Time to Restore Services?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁰

Respondent (CenturyTel) – CenturyTel argues that Socket's proposal is not appropriate for three reasons: 1) the metric proposes a 24-hour criterion but does not limit the application of the criterion to out of service trouble; 2) the exclusions from the measured data are too narrow; 3) the remedy could result in an excessive penalty.⁸¹

Arbitrator's Decision – Socket proposes a 24-hour repair time based on SBC's post-M2A interconnection agreements. CenturyTel proposes no repair time, but proposes to complete repairs "at parity". Without an initial time benchmark, there is little incentive to quickly create "parity" to clear a trouble report. Therefore, the Arbitrator accepts Socket's language. Although not an "apples-to-apples" comparison, Socket's language is also consistent with a company's retail requirements under 4 CSR 240-32.080(H)D.2.A., which requires 90 percent or more of out-of-service trouble not requiring unusual repair to be cleared within 24 hours.

Consistent with 4 CSR 240-32.080(H)1.D., CenturyTel's exceptions for trouble beyond CenturyTel's control (such as CPE) and subsequent trouble reports for the same access line will be accepted. However, the rest of CenturyTel's exceptions are excessive and will not be accepted.

Issue 25 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Repeat Trouble Report Rates?

⁷⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷⁹ Scott Direct at 15-17.

⁸⁰ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸¹ Scott Direct at 17-19.

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Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸²

Respondent (CenturyTel) – CenturyTel argues that Socket's proposal is inappropriate for three reasons: 1) the measurement uses an inappropriate assumption; 2) the exclusions are too narrow; and 3) the remedy could result in an excessive penalty.⁸³

Arbitrator's Decision – The only meaningful difference in the parties' proposals is the benchmark percentage. Socket states its percentage is based on the SBC post-M2A Interconnection Agreement. CenturyTel provides no basis for its benchmark. Therefore, the arbitrator finds Socket's language is most appropriate.

Issue 26 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Interconnection Trunk Orders completed on Time?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁴

Respondent (CenturyTel) – CenturyTel argues the PM is not necessary because it suffers from Socket's small sample size/low order volume and because CenturyTel has not only performed at parity for Socket, but has provided Socket with service that is superior to that it provides switched access customers.⁸⁵

Arbitrator's Decision – This issue will be resolved using portions of each party's proposal. a) CenturyTel's definitions for this issue are accepted; b) Socket's benchmark will be accepted without the specific reference to Feature Group D; c) Socket's language for waiving non-recurring charges plus making a payment of one-month's recurring charge is acceptable since a remedy of simply waiving charges is not incentive for an efficient operation.

Issue 27 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to 911 Listings?

Petitioner (Socket) – Socket argues this PM is necessary because there is no question that accurate 911 database information is vitally important. Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁶

Respondent (CenturyTel) – CenturyTel argues the PMs are unreasonable and that Socket cannot demonstrate that CenturyTel's wholesale performance has been of a quality that would require imposition of any PMs. CenturyTel argues that its proposal accurately reflects that Socket is responsible for reviewing its own listings and if an error is identified CenturyTel will assist in correcting that error, if needed.⁸⁷

⁸² Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸³ Scott Direct at 19-21.

⁸⁴ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸⁵ Moreau Direct at 57-59.

⁸⁶ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸⁷ Moreau Direct at 59-61.

Arbitrator's Decision – CenturyTel must establish an electronic solution as required by the Arbitrator's decision in Article XIII - OSS. Assuming that CenturyTel is responsible for the 911 database, it is reasonable that 100% of the database information should match what Socket has submitted. The database shall be maintained consistent with 4 CSR 240-34.050(1)(B). The Arbitrator finds that Socket's language is accepted.

Issue 28 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Directory Listings – White Pages?

Petitioner (Socket) – Socket argues that accuracy and timely entry of information in the white pages is basic to providing local voice service and is expected by end users. Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁸

Respondent (CenturyTel) – CenturyTel argues that Socket's proposal attempts to apply measures and penalties to something for which Socket is ultimately responsible. CenturyTel argues its proposal accurately reflects that Socket is responsible for reviewing its own listings, but that CenturyTel will assist in correcting the listing, if necessary.⁸⁹

Arbitrator's Decision – CenturyTel's language does not provide for any penalty to provide accurate service to Socket in this matter. Additionally, a proper electronic solution should allow for proper directory listings. Therefore, the Arbitrator finds Socket's language to be most appropriate.

IT IS ORDERED THAT:

1. CenturyTel of Missouri, LLC shall rerun its cost studies using the agreed upon 2-wire and 4-wire Analog Loop cost in its DS1 and DS3 loop cost studies as discussed under the Arbitrator's Decision under Article VIIA, Issue 1.
2. CenturyTel of Missouri, LLC shall correct the error in its fill factor for copper facilities and fiber cost, as discussed under the Arbitrator's Decision under Article VIIA, Issue 1.
3. This report shall become effective on May 18, 2006.

Respectfully submitted,

Kennard L. Jones
Regulatory Law Judge
Arbitrator

⁸⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸⁹ Moreau Direct at 61-62.

**In the Matter of the Request of Southwestern Bell Telephone,
L.P., d/b/a AT&T Missouri, for a Waiver of Certain Require-
ments of 4 CSR 240-29.040(4).**

Case No. TE-2006-0053
Decided May 23, 2006

Telecommunications §8. The Commission determined that 4 CSR 240-29.040(4) does not require the inclusion of calling party number for wireless calls in the Category 11 billing records exchanged by telecommunications companies for traffic that traverses the LEC-to-LEC network.

ORDER CLARIFYING RULE

SUMMARY: This Order clarifies that 4 CSR 240-29.040(4) does not require the inclusion of calling party number ("CPN") for wireless calls in the Category 11 billing records exchanged by telecommunications companies for traffic that traverses the LEC-to-LEC network.

BACKGROUND

After several years of investigation, discussion and meetings with representatives of telecommunications carriers, the Commission adopted a series of rules under new Chapter 29, Enhanced Record Exchange Rules. Over time, the records exchanged between carriers had become less useful for the identification and subsequent billing of originating carriers. A significant amount of traffic was delivered to terminating carriers in which the terminating carrier had no means of identifying the originating carrier, rendering it unable to bill for the termination service.

The Enhanced Records Exchange Rules, made effective on July 30, 2005, instituted several requirements designed to reduce or eliminate unidentified traffic. Separate trunking options, delivery of the CPN in the Signaling System 7 data stream and additional information in the Category 11 records were among the requirements. The Rules have successfully reduced the unidentified traffic delivered to terminating carriers.

Upon implementation of the Rules, a dispute arose concerning whether 4 CSR 240-29.040(4) requires the inclusion of CPN for wireless calls in the Category 11 records. The terminating carriers assert that they need that information to ascertain the jurisdictional nature of the call so as to bill appropriately. Transiting carriers, particularly AT&T Missouri, assert that the rule does not require the inclusion of CPN for wireless calls and AT&T, in the alternative, seeks a waiver if 4 CSR 240-29.040(4) does require the inclusion of CPN for wireless calls.

Procedurally, this matter comes to the Commission pursuant to an Application for Rehearing and Alternative Request for Temporary Variance or Waiver filed by AT&T on July 14, 2005, prior to the July 30, 2005 effective date of the rule. Although the Commission denied rehearing, it granted a Temporary Waiver that has continued to the present and established this proceeding.

DISCUSSION

This case turns on an almost pure question of law. 4 CSR 240-29.040(4) provides as follows:

(4) When transiting traffic for any carrier other than an incumbent local exchange carrier, originating tandem carriers shall, for each compensable call, create and make the following available upon request by a terminating carrier, at no charge to the terminating carrier:

(A) A category 11-01-XX record or, if no Carrier Identification Code is available, a Missouri-specific category 11-01-XX record.

(B) Nothing in (4)(A) above shall preclude two (2) carriers from mutually agreeing to exchange other types of billing records.

(C) A list of originating carriers connected to their tandem switch who originate traffic on the LEC-to-LEC network. The originating tandem carrier will ensure this list of originating carriers is readily accessible to any carrier involved in the completion of such calls. The originating tandem carrier will maintain the following information for carriers using its tandem switch to originate traffic on the LEC-to-LEC network: the name of the originating carrier plus the name, mailing address, telephone number and electronic address of an individual responsible for contacts regarding LEC-to-LEC network traffic billing and payment inquiries.

A "Missouri-specific" Category 11 record is defined in 4 CSR 240-29.020(5) as:

a mechanized individual call detail record for feature group C (FGC) traffic developed by the incumbent local exchange carriers in Missouri for intercompany settlements pursuant to the Missouri Public Service Commission (MoPSC) Report and Order in Case No. TO-99-254. This record contains data transferred from a 92-01-XX mechanized call detail record. The first two (2) digits in this record are "11." This type of call record is identical to a category 11-01-XX record except that it contains an originating operating company number (OCN) in positions 167 through 170 instead of a CIC in positions 46 through 49.

There is no mention in either of these sections of CPN or the delivery of CPN as part of the Category 11 record. In part, this is due to the Commission's interpretation of industry-standard Category 11 records as already including the CPN in a certain field of the record form. This interpretation was not entirely accurate. For wireless calls, it is not standard industry practice to include the CPN in that field.¹

¹ AT&T Witness Read Direct at 13-16 and AT&T Witness Constable Direct at 8-10.

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It is clear that the Commission intended to require the inclusion of CPN for wireless calls. In its Final Order of Rulemaking, the Commission stated:

We thus determine that transiting carriers shall include the CPN as part of the Category 11-01-XX records created for wireless-originated traffic occurring over the LEC-to-LEC network. If any carrier determines that it cannot or should not include the originating CPN of wireless callers in the Category 11-01-XX billing record, it is free to petition the Commission to be excluded from that aspect of our rule. Based on the comments and the record before us, we see no reason to exclude wireless CPN from the billing records generated by transiting carriers. We order implementation of this section without change.

However, the Commission's statement depended on its mistaken assumption that industry-standard Category 11 records contained CPN for wireless calls. Therefore, the Commission's intent was not carried through to the rule itself.

Although the Commission's intent in proposing the rule is clear, we are bound by the rules of statutory construction to look first at the language of the rule itself. If it is clear and unambiguous on its face, then we may not look further in construing the rule. On its face, the rule is not unclear about whether CPN for wireless calls should be included in the Category 11 records. The rule makes no mention of CPN, and no reasonable person reading the rule in isolation would be confused about the inclusion of CPN. The confusion is created by inconsistencies between the wording of the rule and statements of intent from the Commission and not from any inconsistency within the rule itself. Therefore, the rule speaks for itself, and does not require the inclusion of CPN for wireless traffic in the Category 11 records.

FINDINGS OF FACT

1. For wireless calls, it is not standard industry practice to include the CPN in the Category 11 records.
2. Neither 4 CSR 240-29.040(4) nor 4 CSR 240-29.020(5) makes any mention of CPN.

CONCLUSIONS OF LAW

1. Section 386.250(6) RSMo 2000, concerning the jurisdiction of the Commission, provides that the Commission has the authority to promulgate rules. It further provides that such rule promulgation shall comply with Chapter 536 RSMo. Section 4 CSR 240.29.040(4) was properly promulgated and became effective on July 30, 2005.
2. The same principles of construction are used in interpreting agency rules as are used in interpreting statutes.²
3. The intent of the agency promulgating a rule is ascertained by considering the plain and ordinary meaning of the words used in the rule.³

² *Teague v Missouri Gaming Commission*, 127 S.W. 3d 516, 517 (Mo. App. W.D. 2003).

³ *Union Electric Co. v Director of Revenue*, 799 S.W.2d 78, 79 (Mo. Banc 1990).

4. Where language is clear and unambiguous, there is no room for construction.⁴ Section 4 CSR 240-29.040(4) is clear and unambiguous.

5. Section 4 CSR 240-29.040(4) does not contain any language that could require the inclusion of CPN for wireless calls in Category 11 records.

6. Section 4 CSR 240-29.040(4) does not require the inclusion of CPN for wireless calls in Category 11 records.

IT IS ORDERED THAT:

1. Section 4 CSR 240-29.040(4) is clarified in that it does not require the inclusion of calling party number (CPN) for wireless calls in the Category 11 billing records.

2. This order shall become effective on June 2, 2006.

Davis, Chm. and Appling, C., concur.

Murray, C., concurs with opinion attached.

Gaw and Clayton, CC., dissent with opinion to follow.

Dale, Chief Regulatory Law Judge

**DISSENTING OPINION OF COMMISSIONERS ROBERT M. CLAYTON III AND
STEVE GAW**

These Commissioners respectfully dissent from the majority Order clarifying Rule 4 CSR 240-29.040(4). These Commissioners believe that the "Enhanced Record Exchange Rule" ("the rule") requires the inclusion of calling party number ("CPN") as part of the Category 11-01-XX record that it provides for wireless-originated calls transiting the LEC-to-LEC network and terminating to other LECs. The purpose of this rule is to provide accurate billing records that may be used by the terminating carrier to bill the originating carrier for the call and audit the use of their networks. To explain how requiring the CPN would be helpful to achieving the intent of this rule, staff witness Voight said in direct testimony:

"In many instances (but not all instances), knowing the CPN will assist the terminating carrier in verifying the proper jurisdiction of wireless-originated telephone calls. Billing records that contain CPN of wireless-originated telephone calls can aid terminating carriers in establishing practices which reveal network usage. In my opinion, the lack of CPN within the billing record restricts, perhaps severely, the ability of terminating carriers to institute general network auditing guidelines."

The majority claims that the original intent of the Commissioners is not important and is not to be considered because the rule is unambiguously written and therefore must be interpreted as written without looking back to the Commission's intent. These Commissioners conclude differently but agree that the rule is not ambiguous. The Commission previously found in its Order of

⁴ *Community Federal Savings and Loan Ass'n v Director of Revenue*, 752 S.W. 2d, 794 (Mo. Banc 1988).

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Rulemaking that the rule contemplated whether the CPN should be included in the Category 11-01-XX record.

Nothing in the LEC-to-LEC network rules permit the exclusion of CPN in billing records for wireless originated calls. In fact, just the opposite is true because CPN for wireless originated calls is included in billing records for IXC traffic and, with but one exception having nothing to do with CPN¹, the billing records for LEC-to-LEC traffic is “identical” to that for IXC traffic. Section 4 CSR 240-29.020 (5) defines both a category 11-01-XX billing record and a Missouri-specific category 11-01-XX billing record. These definitions further acknowledge that Missouri-specific category 11-01-XX billing records are used for feature group C (FGC) traffic—the type of traffic occurring over the LEC-to-LEC network. This rule specifically acknowledges that a Missouri-specific category 11-01-XX billing record “is identical to a category 11-01-XX record except that it contains an originating operating company number (OCN)...instead of a Carrier Identification Code...” This definition makes it clear that the only difference between category 11-01-XX billing records used in the IXC network, and Missouri specific category 11-01-XX billing records used in the LEC-to-LEC network is with the OCN and CIC codes, and not the CPN. Because CPN is included in category 11-01-XX billing records for IXC traffic, by definition it must be included in the Missouri-specific billing records used for LEC-to-LEC traffic. Thus, the argument that “nothing in the text of the rule specifically requires CPN to be included in the billing records for wireless-originated calls” must fail.

Missouri Independent Telephone Group (“MITG”) filed comments requesting the CPN clarification in the original Rulemaking. The Commission’s response within the Order of Rulemaking unequivocally answered that request. In one of the comments, the MITG asserts that SBC’s Category 11-01-XX billing system does not properly include the calling party number for wireless calls. In response to this, the Commission says,

“We thus determine that transiting carriers shall include the CPN as part of the Category 11-01-XX records created for wireless-originated traffic occurring over the LEC-to-LEC network.”²

Without conceding the point regarding ambiguity, these Commissioners opine that if the rule were ambiguous one may look to the Order of Rulemaking to clarify its intent and meaning. The record in this case suggests that administrative rulemaking requires such a record be created for due process of the parties during and after the process. If the Commission turns a blind eye to the established record, its existence is meaningless. Like its Staff before the Circuit Court of Cole County³,

¹ 4 CSR 240-29.020 (5). The exception is an OCN in positions 167 through 170 instead of a CIC in positions 46 through 49.

² Order of Rulemaking published in the Missouri Register, Vol. 30, No. 12, (June 15, 2005), p. 1389.

³ *State of Missouri, ex rel. Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, Relator v. The Missouri Public Service Commission, Respondent*. Cole County Circuit Court Case No. 05AC-CC00732.

this Commission has reversed its position and its intent, ignoring more than two years worth of work.

These Commissioners do not address the merits of AT&T's claims supporting a waiver request of the rule because this is not the appropriate time in the process to deal with issues such as the alleged high costs that AT&T would have to incur. The Commission should address any encountered problems through an application for a waiver, not by "clarifying the rule" and shifting its position based on different evidence. Since staff's change of opinion occurred after the final Order of Rulemaking, a waiver proceeding is the most appropriate method of resolving the parties' dispute.

"If any carrier determines that it cannot or should not include the originating CPN of wireless callers in the Category 11-01-XX billing record, it is free to petition the Commission to be excluded from that aspect of the rule." ⁴

There is no provision in Missouri statutes that allows the rule to be changed because of an alleged mistake; the only recourse is to amend the rule or for the Commission to waive its application. The Commission should proceed with a petition waiver as it instructed in the order of Rulemaking.

For the foregoing reasons, these Commissioners respectfully dissent.

⁴ Order of Rulemaking published in the Missouri Register, Vol. 30, No. 12, (June 15, 2005), p. 1389.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its Order, the Commission voted to clarify the Enhanced Record Exchange Rule by affirmatively stating that the rule does not require Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri to include the Calling Party Number (CPN) in Category 11 billing records exchanged by telecommunications companies for traffic that traverses the LEC-to-LEC network. I agree with the outcome, but I am concerned with language that asserts the Commission's intent was to include CPN in Category 11 billing records.

I voted against the final version of the Enhanced Record Exchange Rule, 4 CSR 240-291.040, because I was convinced that this rule imposes excessive costs and unnecessary regulatory burdens on the Missouri telecommunications industry. When AT&T Missouri¹ requested a rehearing on the rule, I agreed with the Commission regarding its denial, but I filed a concurrence expressing my concerns, once again, that the Enhanced Record Exchange Rule was too burdensome and that I did not believe that CPN should be required in Category 11 billing records.²

In Case Number TX-2003-0301 AT&T Missouri stated that the company could not immediately comply with the Commission's requirement for CPN in the Category 11 billing records for wireless-originated calls.³ AT&T Missouri argued that tracking of the CPN is entirely unnecessary because other data already captured by the company are sufficient for billing purposes. Industry standards do not require that the originating CPN be captured in the accounting records for wireless-originated calls. Rather, industry standards rely on the capture and recording of billing account numbers in the creation of billing records because this information is more reliable.⁴

Therefore, I agree with the conclusion that CPN is not required in Category 11 records for wireless calls, and continue to disagree with the statements of intent in the Final Order of Rulemaking and the Commission's Order.

¹ Then Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri.

² See *Concurring Opinion of Commissioner Connie Murray*, Case No. TX-2003-0301.

³ AT&T Missouri also asserted that it currently is not technically feasible for its network switches to track and record the CPN. AT&T Missouri asserted that it needed at least one year to investigate whether its 5 ESS tandem switches have the technical capacity required by the rule and to complete necessary changes to its record creation and billing systems to include the CPN in billing records. This is time-consuming and expensive work that could take even longer than a year to complete.

⁴ The CPN will not always indicate which wireless carrier actually originated the call because some wireless companies who have spare capacity contract to carry traffic for other wireless carriers. In addition, because of wireless number portability, the CPN originally assigned to one wireless carrier may no longer belong to that carrier.

In the Matter of the Application of Aquila, Inc. For Permission and Approval and a Certificate Of Public Convenience and Necessity Authorizing it To Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri Near the Town of Peculiar.*

*Case No. EA-2006-0309
Decided May 23, 2006*

Gas §3. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.

Certificates §34. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri because the Commission has the authority to consider land use issues for power plants proposed for first-class non-charter counties, such as Cass County. Also, the Commission more properly hears other issues (such as identifying locations of existing gas pipelines that could deliver sufficient fuel at acceptable pressure) as well as zoning. Also, the Western Districts opinion and the Circuit Court of Cass County's order also come into play as factors.

Certificates §43. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.

Electric §9. Aquila is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo, and the Commission has jurisdiction over Aquila's application.

Electric §3. The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.

APPEARANCES

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* See page 327 for another order in this case. This case was appealed to Cass County Circuit Court (06CACV01698) and to the Missouri Court of Appeals, Western District (WD67739). Also see EA-2005-0248, page 435, Volume 13, MPSC 3d.

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REGULATORY LAW JUDGE: **Ronald D. Pridgin**

REPORT AND ORDER

Procedural History

On January 25, 2006, Aquila, Inc., applied to the Missouri Public Service Commission for a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri. The Commission established February 27 as the deadline for interested parties to intervene. The following parties filed applications to intervene: Sedalia Industrial Energy Users' Association; StopAquila.org; Cass County, Missouri; the City of Peculiar; Frank Dillon, Kimberly Miller, and James E. Doll; and Southwest Power Pool, Inc. The Commission granted those applications.

The Commission held an evidentiary hearing on April 26-28, May 1, 3, and 4, 2006.¹ The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

¹ A more complete procedural history of the events leading up to this case may be found in the Commission's Order Clarifying Prior Certificates of Convenience and Necessity in Case No. EA-2005-0248 (April 7, 2005) (rev'd by consent of parties in light of *StopAquila.org v. Aquila*, 180 S.W.3d 24 (Mo.App. 2005)).

Findings of Fact**The Parties, the Facilities, Procedural Matters, and Related Decisions**

1. Aquila is a Delaware Corporation with its principal office and place of business at 20 West 9th Street, Kansas City, Missouri 64105-1711.
2. Aquila is a regulated public utility corporation subject to the jurisdiction of the Commission as provided by law. The Commission has authorized Aquila to conduct its business in its certificated areas in Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions. As such, Aquila is engaged in providing electrical, natural gas and industrial steam service in those areas of the State certificated to it by the Commission, including most of Cass County.
3. Intervenor Sedalia Industrial Energy Users' Association is an unincorporated association consisting of large commercial and industrial users of natural gas and electricity.
4. Intervenor StopAquila.org ("StopAquila") is an unincorporated association of individuals, some of whom reside in Cass County, Missouri.
5. Intervenor Cass County, Missouri ("Cass County") is a County of the State of Missouri and is a first-class, non-charter county.
6. Intervenor the City of Peculiar ("Peculiar") is a city of the fourth class of the State of Missouri.
7. Intervenor Frank Dillon, Kimberly Miller, and James E. Doll ("Certain Residents of Cass County") are individuals residing in Cass County, Missouri.
8. Intervenor the Southwest Power Pool, Inc. ("SPP") is a not-for-profit corporation organized and existing under the laws of the State of Arkansas. SPP, a FERC-approved regional transmission organization ("RTO"), serves more than 4 million customers and covers a geographic area of over 250,000 square miles. SPP's membership includes 13 investor-owned utilities, 7 municipal systems, 9 generation and transmission co-ops and several independent power producers and power marketers. Aquila joined the SPP Regional Tariff on July 1, 2005, after the transmission facilities for South Harper and the Peculiar substation were in-service. SPP administers open-access electric transmission service in several Midwest states.
9. The Staff of the Commission traditionally appears as party in Commission proceedings and is represented by the Commission's General Counsel.
10. Aquila and its predecessors have been operating electric transmission and distribution systems in unincorporated Cass County for nearly 90 years pursuant to authority from this Commission and a franchise from Cass County.
11. The two tracts of real estate which are the subject of Aquila's application herein are identified as follows: (a) an approximate 74 -acre tract of real estate at or near 243rd Street and Harper Road, and generally located in parts of Sections 29 and 32, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter, "Tract A"); and (b) an approximate 55-acre tract of real estate at or near 203rd Street and Knight Road, and generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in Cass County, Missouri (hereinafter, "Tract B").

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12. Tracts A and B are located within Aquila's certificated service area.
13. Tracts A and B are located in unincorporated Cass County, Missouri.
14. Cass County's 1991 Comprehensive Plan (Ex. 103), 1997 Comprehensive Plan Update and Zoning Ordinance (Ex. 104), 2003 Comprehensive Plan Update and Zoning Ordinance (Ex. 105), and 2005 Comprehensive Plan Update and Zoning Ordinance (Ex. 108) reflect changes in Cass County's land use plans and intended implementation of those plans over time.
15. Cass County's 2005 Comprehensive Plan establishes multi-use tiers in which non-agricultural uses "such as commercial and industrial uses" are encouraged. Tract A is located in such a multi-use tier, as is the portion of Tract B on which the South Harper Facility is located.
16. The South Harper Facility includes a peaking power production plant consisting of three natural gas fired combustion turbines — each having a nameplate rating of 105 megawatts — and an associated electric transmission substation situated on approximately nine acres of the 74-acre tract of land.
17. The Peculiar Substation, a related electrical transmission substation, utilizes approximately 7.5 acres of the 55-acre tract of land.
18. By letter of November 5, 2004, the Executive Director of the Commission stated that the Commission was aware of Aquila's plans to construct additional natural gas fired generation in the Company's service territory near the City of Peculiar and that no additional authority was necessary from the Commission with regard to said construction by Aquila.
19. On January 11, 2005, the Honorable Joseph P. Dandurand, Circuit Judge of Cass County, issued a judgment in Cass County Case No. CV104-1443CC ("Final Judgment"). The Final Judgment read, in part, that Aquila was enjoined from constructing and operating the South Harper Facility and the Peculiar Substation. Aquila posted an Appeal Bond on January 11, 2005, that was approved by the Circuit Judge and that suspended the effect of the injunction pending the appeal of the Final Judgment.
20. A Notice of Appeal was filed by Aquila on January 12, 2005, in the Circuit Court of Cass County regarding the Final Judgment. Aquila's appeal of the Final Judgment in Case No. CV104-1443CC was assigned Case No. WD64985 in the Missouri Court of Appeals, Western District.
21. On January 28, 2005, Aquila filed its application with the Commission, Case No. EA-2005-0248, seeking specific confirmation or, in the alternative, the issuance of certificates of convenience and necessity authorizing it to construct, install, own, operate, control, manage, and maintain the Facilities on Tracts A and B. The syllabus of the Commission's ruling in that case (which has since been vacated by this Commission) is that the order "clarifies prior certificates of convenience and necessity of Aquila, Inc., and confirms that, in order to serve its customers, Aquila has already been granted specific authorization to build its South Harper Facility and Peculiar Substation."
22. In order to provide reliable and adequate service to its customers, Aquila constructed the South Harper Facilities. Construction was completed during the summer of 2005, and the Facilities were placed into commercial operation and began serving Aquila's customers during late June and early July, 2005.

23. On December 20, 2005, the Court of Appeals issued its opinion in Case No. WD64985, *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005), in which the Court of Appeals held, in part, as follows:

Because we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt.

* * *

If we consider the Public Service Commission Law as a whole and bear in mind the essential purposes of public-utility regulation, it becomes clear that a Commission order granting a service territory to one utility does not function as the "specific authority" required for the construction of an electric plant under section 393.170.1 in derogation of county zoning authority.

* * *

For these reasons, we affirm the circuit court's judgment permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County's zoning law without first obtaining approval from the county commission or the Public Service Commission. In so ruling, however, we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate.

24. On January 20, 2006, Aquila attempted to file with Cass County requests for special use permits concerning Tracts A and B. Officials of Cass County would not accept the filing of Aquila's request citing the Final Judgment and the pending judicial review action concerning the Commission's order in Case No. EA-2005-0248.

25. On January 25, 2006, Aquila filed the application which is the subject of this proceeding requesting the Commission approve certificates of convenience and necessity authorizing the Company to acquire, own, operate, maintain, and otherwise control and manage the Facilities located on Tracts A and B. Aquila further requested such other orders and findings as are appropriate under the circumstances.

26. After a hearing in Harrisonville, Missouri in Cass County Case No. CV104-1443CC, on January 27, 2006, Judge Dandurand extended the stay of the injunction portion of his Final Judgment until May 31, 2006.

27. By the Commission's order of March 2, 2006, Sedalia Industrial Energy Users' Association, StopAquila, Cass County, Peculiar, Certain Residents of Cass County, and SPP were granted intervention in this proceeding.

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28. In connection with the application, two local public hearings were held on March 20, and one local public hearing was held on March 30, all in Harrisonville, Cass County, Missouri, at which time over 50 witnesses appeared and testified.

29. Intervenor StopAquila and Cass County each filed a motion to dismiss the application. These motions were denied by the Commission's order issued April 20, 2006.

30. Evidentiary hearings were held in Jefferson City, Missouri on April 26, 27, and 28, and May 1, 3, and 4, 2006, and testimony and certain exhibits were admitted into evidence. Following the submission of posthearing briefs and proposed reports and orders, the matter was submitted on the record.

Need for the Facilities

31. Aquila was a party to a Power Sales Agreement dated February 22, 1999, ("PPA") that expired on May 31, 2005. The PPA provided that Aquila could take up to 500 MW of capacity during the summer months and 320 MW in the winter months.² The Facilities were constructed to partially replace the electricity Aquila was obtaining under this PPA and to meet increased customer demand.

32. Aquila issued a RFP and using MIDAS Gold and Realtime models, Aquila evaluated potential alternative resources. The lowest cost scenario under base conditions was with a plant with 5 combustion turbines (CTs), but Aquila deemed the 3-CT South Harper plan to be its "preferred plan."

33. Aquila decided not to enter into another purchase power contract with Calpine because the contract Calpine offered proposed higher prices and provided for significant operating constraints. The Aries plant is a combined cycle unit, which is an intermediate type plant and not a peaking facility.

34. In addition to the need to replace the Aries PPA, Aquila also needs capacity and energy to meet growth in its Missouri customers' electrical needs.

35. Once Aquila had decided to move forward with the South Harper Facility, Calpine did attempt to provide an unsolicited one year purchased power agreement. However, the Calpine short term offer did not excel over the long term decision to build, and, by the time the offer was received, Aquila had incurred sunk costs in pursuit of the self-build plan.

36. In January of 2004, Aquila informed the Staff and the Public Counsel that it would pursue a self-build option. Before and after this announcement, the Staff had been receiving resource planning updates from Aquila about every six months, and Aquila used some of the Staff's suggestions as guidance for its self-build plan. If the Facilities were not in service in June 2005, Aquila would need to add capacity to meet load and reserve requirements, and the cost of other options were higher than building the South Harper Facilities.

37. While Aquila may also need baseload capacity, Aquila's load is unique in that it needs generation capacity suited to meeting peak demands.

² The power was supplied from a merchant plant—the Aries plant located in Cass County—that an unregulated Aquila affiliate had owned with Calpine at one time. Before the PPA expired, Aquila's affiliate had sold its interest in the plant to Calpine.

38. This need for peaking capacity is driven by the high percentage of residential customers on Aquila's system who are very weather sensitive and have a highly variable load. Because Aquila needed capacity to serve these customers, combustion turbine units such as those at the South Harper Facility are appropriate.

39. Aquila's transmission system planning department completes a ten-year transmission planning study every three years. The 2002 study analyzed the Grandview, Belton, Harrisonville, and Pleasant Hill area. A critical issue was identified regarding the amount of load on the 69 kV system and the ability to adequately serve it. A number of options were analyzed, all of which were viewed as costly. By upgrading the local transmission system in conjunction with construction of the Facilities, Aquila was able to improve the transmission system reliability to the growing western area of the service territory of Aquila Networks-MPS.

40. During the months of July through December of 2005, the South Harper Facility was operated for a total of 429 hours on 57 days, representing nearly 74,000 MWh of power generation for Aquila Networks-MPS system customers.

41. The Facilities have been incorporated into SPP's expansion plan and will provide the energy consumers with greater access to generation resources in the region, improve the reliability of the bulk transmission system, improve the overall efficiency and economics of transmission operations, and provide reactive support to the local loads and the overall system.

42. The residents of Cass County who have stated opposition to the Facilities, even if they are not direct Aquila customers, will be served by the energy and capacity generated by this plant. The Peculiar Substation will relieve the load on other transmission facilities in southern Kansas City and benefit the overall operation of the transmission system in that area. This addition will improve the reliability of the system in this growing area.

43. There is a public need for the Facilities and related services.

Site Selection and Land Use Matters, Including Zoning and Other Issues

44. Cass County has two employees in its Planning and Zoning Department who perform actual planning functions. Neither of these employees is a certified land use planner. If Aquila filed a special use permit application for a generating or transmission facility today, the County would have to hire an outside consultant because the issues associated with such a facility are simply "more than a one or two-man shop can handle."³

45. The issue of the appropriateness of the Facilities in their respective locations has been the subject of extensive briefing, argument, and written and live testimony in this proceeding. Witnesses were subject to detailed cross-examination by both legal counsel for the parties and members of this Commission.

46. As part of Aquila's Integrated Resource Plan ("IRP") and in response to a request for proposals ("RFP") for capacity and energy for Aquila which was issued

³ Tr. Vol. 10, p. 1361.

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on January 22, 2003, a site selection study was prepared by Sega Inc. ("Sega"), an engineering firm, on behalf of Aquila. The RFP provided constraints such as delivery points and availability which were factors in the site study.

47. A preliminary study performed by Sega, at the direction of Aquila for siting of the Facilities, generally evaluated five different tracts of land in Cass County. This initial effort identified one fatally flawed site and recommended a site north of Harrisonville which became known as the "Camp Branch" site. The study was later expanded to include three more sites. The expanded study ranked each site and recommended the Camp Branch site as the best location.

48. On July 13, 2004, Aquila's Special Use Permit Application (No. 2589) was taken up by the Cass County Planning and Zoning Board. Darrell Wilson, Zoning Director, noted that the applicant for the special use permit would be given one hour to speak. The opposition would then have one hour, and the applicants would have 15 minutes for rebuttal. The proceeding began at 7:00 p.m., witnesses were sworn, and a few preliminary matters were addressed. Robert Hardin, Chairman of the Planning Board, stated that redundancies would not be appreciated and that there should not be rehashing of positions and opinions. He referred to Aquila's application as significant and said that he wanted all the facts to be brought forth on both sides of the issue. After Aquila presented its case, approximately ten people spoke in opposition to the application. Aquila representatives spoke for approximately 15 additional minutes, and Scott Michie, the consultant planner for the Planning Board, then made some comments. The Chairman then noted that the Board's staff had already stated their opinions, said there may be some questions by the Board, and then a vote would be taken. Following questions from the Board, a motion was made to approve Aquila's application. A vote was taken, and the Chairman noted that the motion was voted down with a 0-6 vote. He then said the recommendation for denial of Aquila's application would be forwarded to the Board of Zoning Adjustment. The hearing was adjourned at 9:45 p.m.

49. After the Cass County Planning and Zoning Board recommended to the Cass County Board of Zoning Adjustment ("BZA") denial of the special use permit for the Camp Branch site, Aquila sought guidance from Cass County Commissioner Mallory on the expected actions of the BZA. Commissioner Mallory, who served as the Chairman of the BZA, advised Aquila that its application had a snowball's chance in hell of being approved.⁴

50. Based upon Commissioner Mallory's guidance, Aquila turned to alternatives which included the option to relocate the site for the Facilities to a community that had made overtures to Aquila. Aquila then began discussions with those communities, including the City of Peculiar.

51. Aquila also requested that Sega's investigation be expanded further to include the communities that had expressed interest in locating the Facilities, and Sega then evaluated and ranked twelve sites according to specific criteria.

52. Sega applied nine engineering criteria, and Sega personnel visited, photographed, and observed each site. Further, Sega cataloged and evaluated the physical attributes of each site. Each site was examined for: adequacy of size and

⁴ Tr. Vol. 10, pp. 1371-1372.

configuration for an overall plant layout template; the location relative to Aquila's existing electric transmission grid; for proximity to adequate natural gas supply lines; location and adequacy of water supply lines; proximity to existing sanitary sewer services; and access.

53. Sega also examined each site for the ability to obtain permits in a timely fashion and evaluated each site for the likely schedule required for acquisition, permitting, and construction of the plant. Acquisition costs for the South Harper site were considered reasonable, a willing seller was ready to move forward, the City of Peculiar was favorable to annexation and tax exempt financing, and there appeared to be local support for the project.

54. The geographic and geologic features of the site appeared appropriate, there were major gas pipeline lines located on the property, an existing compression station was located adjacent to the proposed site, a competing gas transmission pipeline was located only about two miles to the south, and water capacity appeared to be adequate.

55. Cass County is an area with rapidly increasing population and energy demand so that siting a power plant in Cass County would put the plant where Aquila's load is increasing. With the increasing demand in this service area, and the need for residential peaking power, the South Harper Facility is a better choice to meet Aquila's customers' needs than Aries, which is an intermediate unit with an optimal running time of 12 hours.

56. The location of the South Harper Facility is geographically diverse from Aquila's other Missouri electric power generating plants.

57. There are two advantages of locating plants apart geographically: (1) it reduces the likelihood of losing power from multiple plants at the same time due to a common failure—for example, inadequate fuel gas pressure, and (2) it reduces dependence on the same transmission paths (or lines) to serve customers which reduces losses and the risk of overloading the transmission system.

58. There are natural gas pipelines and transmission lines near the South Harper Facility with sufficient capacity to serve it.

59. The availability of two natural gas lines with sufficient capacity to serve the plant enhances power plant reliability and provides competition in sale of the fuel used by the South Harper Facility.

60. A comparison of land use near the Facilities with land use near other power plant sites indicates that land use in the vicinity of simple-cycle generation plants includes sparsely populated agricultural, residential and industrial areas. The South Harper Facility is in an "agricultural" area with a housing density that is "rural" in nature. This type of land use is not uncommon in the vicinity of these types of electric generation plants in Missouri. In some cases the population density around these types of plants is relatively dense, approaching that of a residential area, but often the current housing density around the generation plant includes homes that were built after the generation plant was operating.

61. The location of the South Harper Facility site drove the location of the 345 kV to 161 kV substation northwest of Peculiar – the Peculiar Substation. The Peculiar Substation was also located to minimize the needed right-of-way distance and take advantage of an existing 69 kV right-of-way.

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62. Regardless of the existence of the South Harper Facility, there is a need for a substation at or near where the Peculiar Substation is sited.

63. Cass County's Comprehensive or Master Plan establishes the "vision" of the community from a land use planning perspective. The County's zoning ordinances are a means by which that vision may be implemented. If applications for zoning changes are in accordance with the Comprehensive Plan, they are presumed to be reasonable.

64. Cass County's current 2005 Comprehensive Plan establishes that the area encompassing the South Harper Facility and Peculiar Substation is designated as a "multi-use tier." Multi-use tiers are areas near cities and towns where non-agricultural development, such as commercial and industrial uses, is encouraged. These areas are: (1) positioned as transition areas from urban to rural densities; (2) located either along rural highways or major arterials, or close enough to them to provide access to non-agricultural traffic; and (3) developed for a mix of land use, including industrial uses.

65. Cass County has represented that Exhibit 102, offered by Cass County and received into evidence near the end of the evidentiary hearings in this proceeding, is a map of Cass County's zoning as of 1999.

66. During the evidentiary hearings, Presiding Cass County Commissioner Mallory testified that Exhibit 102 is the map adopted by reference in Cass County's February 1, 2005 zoning ordinance. That ordinance repealed Cass County's prior zoning ordinance. A comparison of Exhibit 102 with the Comprehensive Plan Update 2005 Land Use Tiers map, found as Schedule WW-10 to the surrebuttal testimony of Staff witness Wood and following page 38 of Exhibit 118, reveals the municipal boundaries do not match; those of the Comprehensive Plan Update-2005 Land Use Tiers map encompass more territory than those of Exhibit 102.

67. Presiding Cass County Commissioner Mallory was unable to correlate the Classification of Zones found at page 27 of Exhibit 119 with the zones drawn on Exhibit 102. Cass County offered and the Commission received into evidence Cass County's 2005 Zoning Order (Exhibit 08), 1997 Zoning Ordinance (Exhibit 104) and 1991 Zoning Ordinance (Exhibit 103). The second page of each includes a provision that expressly repeals prior zoning ordinances upon adoption of the new ordinance. Moreover, the 2005 ordinance includes, on page 27, a table that associates a symbol with a zone name and, on page 28, a table that correlates current zoning districts with prior repealed zoning districts. The districts do not correspond with the legend shown on the Exhibit 102 zoning map. Additionally, the zoning district tables in the 1997 (at page 25) and 1991 (at page 23) zoning ordinances do not correspond with the legend shown on the Exhibit 102 zoning map.

68. Exhibit 102 has not been updated since 1999 and may not be consistent with either Cass County's 2003 Comprehensive Update Plan or its 2005 Comprehensive Update Plan.

69. Of further significance, the Exhibit 102 zoning map indicates in the lower right-hand corner that the roads shown on the map are those as of 1971 and 1972. The experts Cass County has retained in the past—Bucher, Willis & Ratliff Corporation—to assist it in developing its land use plans and zoning ordinances since at least before 1991 did not testify in this case.

70. Cass County maintains that the locations of the South Harper Facility and Peculiar Substation, Tracts A and B, are currently zoned "agricultural." The County's Zoning Order makes it clear that the intention of such a classification is not to encourage the development of "low density residential areas." In fact, the development of a power plant, as well as a number of other industrial uses, is permitted with a special use permit. This variety of permitted uses includes commercial feedlots, metal and coal mining, sawmills, fertilizer mixing facilities, railroad switching and terminal services, airports, sewage systems, and sanitary landfills.

71. An evaluation of the evidence in this proceeding, including factors and policies set out in the County's Comprehensive Plan and Zoning Order, demonstrates that the Facilities are appropriate and comparable uses for the areas. For example:

- Cass County Presiding Commissioner Gary Mallory characterized the Facilities as "light industrial uses."
- The area of the South Harper Facility is clearly a transition area from an urban to rural density as can be seen from the increased density of residential housing as one travels northeast from the plant toward Peculiar.
- The Facilities are near Peculiar, and both have access to roads with access to major arterials, and rural and other highways.
- The Facilities will not result in any meaningful increase in traffic in the areas.
- A variety of services are available to the sites, including electricity, water, fire and police protection.
- There is no evidence of any nuisance or interference by the Facilities with farming operations. The entire northern section of the South Harper Facility site is occupied by a farm, and Aquila had previously committed to leave that section as undeveloped farm land.
- Neither the South Harper Facility nor the Peculiar Substation occupies the entirety of the parcels on which they sit – both comprise only 13 percent of the total parcel.
- There is no evidence of any violation of environmental or other permits or regulations by the Facilities. There is no evidence of any adverse health impacts that have been shown to be associated with the Facilities.
- Neither property is located within the 100 year flood plain.
- There are no issues regarding actual or potential disturbance of significant natural resources at the sites.
- There are no issues regarding stormwater runoff at the sites.
- There are no issues regarding drainage easements at the sites.
- Neither parcel has any chance of being part of a residential subdivision.

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- There are no applicable yard or open space requirements.
- The Facilities are significantly set back from the roadways, and have been landscaped and bermed (where natural shielding does not already exist) to reduce their visual impact.

72. The location and size of the Facilities in relation to adjacent sites, as well as the nature and intensity of the use of the Facilities in relation to those adjacent uses, also militates in favor of a finding that these Facilities are appropriately located. Specifically, the South Harper Facility is adjacent to a 6.4 acre gas compressor station facility which has been in existence in the area for more than 50 years. The South Harper Facility is fully compatible with this preexisting industrial use.

73. At no time during the Peculiar annexation process that was eventually aborted, nor during the time of Aquila's grading permit process, did Cass County raise any issues about the land use being proposed by Aquila and the City of Peculiar for the South Harper site.

74. The location and design of the Facilities are consistent with sound planning principles, were sited using defensible planning practices, are compatible with the surrounding development, and are consistent with the Cass County 2005 Comprehensive Plan and Zoning Order.

75. The 2005 Plan is designed to balance local land use policy with the type and nature of growth that Cass County is experiencing, and the County's 2005 Comprehensive Plan acknowledges that limits on development must be balanced with private economic interests.

76. The 2005 Plan provides for a multi-use tier which encourages non agricultural uses such as commercial and industrial uses. The Facilities are located in such a multi-use tier.

77. There are no anticipated health effects from air emissions, and an air permit was issued by the Missouri Department of Natural Resources because the emissions will not significantly cause or contribute to a degradation of air quality in the area.

78. Aquila has taken a number of measures to further mitigate impacts on its neighbors.

79. The Facilities were designed to meet the County's residential noise emissions standards, and Aquila has embarked on projects to reduce the sound levels even further. Notably, Cass County has a "noise" ordinance that regulates acceptable sound levels in unincorporated areas of the county and no one has filed any formal complaints with Cass County alleging sound from the South Harper Facility violates Cass County's "noise" ordinance. Approximately 1,200 trees and shrubs were planted on the grounds and neighboring properties, and Aquila consulted with neighbors regarding landscaping.

80. The Peculiar Substation site is 55 acres, of which only 7.5 acres is being used for operations. The South Harper Facility site has a total of 73.6 acres, and the footprint for the plant and substation is only 9.3 acres. Aquila is using approximately 13 percent of the land area for the Facilities. The remainder of the property consists of "buffer zones."

81. Aquila's original land purchase for the Facilities included 35 acres north of the plant in excess of what was needed for the Facilities. Aquila has committed to leaving this land undeveloped as an additional "buffer zone" between the Facilities and the residential neighbors.

82. Over 250 local residents have signed letters of support for the Facilities, and Aquila worked with the Grand Oaks subdivision developer and the twenty current residents to design the Peculiar Substation on Tract B, and those residents are satisfied with its design and operation. Three of the four residents outside of Grand Oaks but closest to the Substation signed letters of support.

83. Both the City of Peculiar and the City of Lake Annette, the municipalities closest to the South Harper Facility, support the location of the generation plant and related substation.

84. The locations of the Facilities on Tracts A and B are suitable based on utility infrastructure needs and are compatible with local land use issues.

Financial Matters

85. Aquila financed the construction of the South Harper Facility with one hundred and forty million dollars (\$140,000,000) of tax-advantaged revenue bonds issued under the economic development authority of the City of Peculiar under Article VI Section 27(b) of the Constitution of the State of Missouri and Sections 100.010 through 100.200, RSMo. The financing issue is the subject of a case currently pending before the Missouri Supreme Court.

86. The Facilities have been constructed, the project has been funded, and Aquila has suffered no impairment to its credit as a result. Aquila has had the financial wherewithal to fund the construction and operation of the Facilities.

87. In 2004, the Company's consolidated equity ratio was approximately 32 percent. As of September of 2005, after the facilities had been constructed Aquila's consolidated equity ratio had grown to roughly 42 percent. Despite the significant capital commitment necessary to fund the construction of the Facilities, the Company's financial condition improved.

88. Since 2002, the Company has undergone financial restructuring, and the process continues to this day. Aquila has sold most of its non-regulated businesses, is in the process of selling those that remain, and is in the process of selling select domestic utility properties, with proceeds earmarked to reduce debt and further strengthen the Company's balance sheet.

89. Aquila is qualified from an operational standpoint and has the financial ability to own, operate, control and manage the Facilities and provide the related service, and Aquila's proposal is economically feasible.

Conditions

90. The Staff recommended that the Commission impose six particular conditions on a site specific certificate of convenience and necessity for the Facilities as follows:

- i. Roads must be repaired at the conclusion of work to equal or better condition than when Aquila first started working on this site.

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- ii. Roads must be worked on at least weekly to repair any ruts or holes, and dust abatement measures are adopted.
- iii. Sound abatement measures must be fully utilized (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer).
- iv. Emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood.
- v. Security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort.
- vi. Security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would impact the surrounding area.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Aquila is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo, and the Commission has jurisdiction over Aquila's application.

The dominant purpose in creation of the Commission is public welfare.⁵ The administration of its authority should be directed to that purpose. In every case where it is called upon to grant a permit, or to authorize an additional service to be rendered by an authorized certificate holder, the Commission should be guided, primarily, by considerations of public interest.⁶

Section 386.610⁷ reads, in relevant part, that "[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." The Commission must weigh the benefits and detriments to all the groups affected by its decision.

In the *Missouri Pacific Freight Transport Company* case, the Court stated that the "rights of an individual with respect to issuance of a certificate are subservient to the rights of the public . . ."⁸ Additionally, in a case affirming the Commission's grant of a certificate of convenience and necessity to a water utility, the Court in *Public Water Supply District No. 8* stated that "the ultimate interest is that interest

⁵ *Alton R. Co. v. Public Service Commission*, 110 S.W.2d 1121, 1125 (Mo. App. 1937).

⁶ *Missouri Pacific Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

⁷ All statutory references are to RSMo (2000) and the Cumulative Supplement (2004) unless otherwise indicated.

⁸ *Id.*, citing *State ex rel. Missouri, Kansas & Oklahoma Coach Lines v. Public Service Commission*, 179 S.W.2d 132; *State ex rel. Interstate Transit Lines v. Public Service Commission*, 132 S.W.2d 1082.

of the public as a whole . . . and not the potential hardship to individuals . . .”⁹ An examination of those cases in Missouri finds that the determination of public interest is a balancing test between public and private interests.¹⁰ Further, “[n]o one factor is dispositive in balancing public versus private interests. Each case stands on its own facts and circumstances.”¹¹

Section 386.250, jurisdiction of Commission, reads, in relevant part, as follows:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same . . .

Section 393.140, general powers of Commission in respect to gas, water, electricity and sewer services, reads, in relevant part, as follows:

The commission shall:

(1) Have general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, and all gas plants, electric plants, water systems and sewer systems owned, leased or operated by any gas corporation, electrical corporation, water corporation, or sewer corporation.

(2) Investigate and ascertain, from time to time, the quality of gas or water supplied and sewer service furnished by persons and corporations, examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and in supplying and distributing water for any purpose whatsoever, and in furnish-

⁹ *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. W.D. 1980).

¹⁰ *Rhein v. City of Frontenac*, 809 S.W.2d 107 (Mo. App. 1991). See also, *Hoffman v. City of Town and Country*, 831 S.W.2d 223 (Mo. App. E.D. 1992), and *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963).

¹¹*Id.* at 110.

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ing a sewer system, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas, electricity, water, or sewer system, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations, water corporations, and sewer corporations.

Section 393.140 conveys upon the Commission broad supervisory powers and provides that the Commission shall have general supervision over all electric utilities operating in Missouri.¹²

The Commission exercises the police power of the state, and the Commission is "to have very broad jurisdiction in the field in which it was intended to operate."¹³ Therefore, "the power of the Public Service Commission . . . overrides all contracts, privileges, franchises, charters or city ordinances."¹⁴

Section 393.170, approval of incorporation and franchises - certificate, reads as follows:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.
2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
3. The commission shall have the power to grant the permission and approval herein specified whenever it shall

¹² *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753 (Mo. banc 2003).

¹³ *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 (Mo. banc 1944).

¹⁴ *May Department Stores Company v. Union Electric Light & Power Company and Cupples Station Light, Heat & Power Company*, 107 S.W.2d 41 (Mo. banc 1937) (internal citations omitted).

after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Section 64.235, improvements to conform to plan, approval required (noncharter first class counties), reads as follows:

From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefore to the planning board, nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission after public hearing in the manner provided by section 64.231.

The Facilities are a “development” or a “public improvement,” as contemplated by Section 64.235.

The Commission does not conclude that Aquila requires an additional certificate of convenience and necessity for its Peculiar Substation. A utility holding an area certificate may build transmission facilities within its certificated area without having to obtain a line certificate.¹⁵ Nevertheless, Aquila has requested a line certificate for its Peculiar Substation, and the Commission concludes that no harm will be caused if the Commission grants a line certificate for the substation. Further, acting on Aquila’s request for a certificate of convenience and necessity for its Peculiar Substation may lead to a quicker final resolution of questions of the legality of that facility.

This Commission and the Appellate Courts have both defined the “public convenience and necessity” standard of 393.170.3. “Necessity” does not mean

¹⁵ *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960).

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essential or absolutely indispensable. Rather, it means that an additional service would be an improvement justifying the cost and that the inconvenience occasioned by the lack of a utility is so sufficiently great as to amount to a necessity.¹⁶ Additionally, the “public” does not consist solely of the residents surrounding the Facilities or solely of Cass County residents. The “ultimate interest is that interest of the public as a whole . . . not the potential hardship to individuals.” The rights of an individual resident with respect to the issuance of a certificate are subservient to the rights of the public as a whole.¹⁷

The Commission has articulated the legal standard to be met by applicants for a certificate of convenience and necessity as follows:¹⁸

- Whether there is a need for the involved Facilities and related service;
- Whether Aquila is qualified to own, operate, control and manage the involved Facilities and provide the related service;
- Whether Aquila has the financial ability for this undertaking;
- Whether Aquila’s proposal is economically feasible; and
- Whether the involved Facilities and related service promotes the public interest.

Positive findings with regard to the first four factors, will, in most instances, support a finding that an application for a certificate of convenience and necessity will promote the public interest.¹⁹ The Courts of Appeals have articulated the standard and policy similarly to the Commission.²⁰

The Missouri Court of Appeals recently stated that the Commission may also consider “current conditions, concerns and issues, including zoning,”²¹ matters that fall under the item “whether the involved facilities and related service promotes the public interest.” Although the Court of Appeals held that this Commission had been misinterpreting *Harline*, the decision in the *Aquila* appellate opinion does not require the Commission to promulgate new rules or establish new procedures to consider an application pursuant to Section 393.170.3.

Land use and other current conditions, concerns, and issues, including zoning, may be encompassed within the Commission’s consideration of whether the facilities and related service “promote the public interest.”²² There is no need or requirement that such issues be taken up separately from a consideration of this

¹⁶ *In re Timber Creek Sewer Co.*, EA-99-202, 8 Mo. P.S.C. 3d 312, 314.

¹⁷ *State ex rel. Public Water Supply Dist. No. 8 v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo.App. W.D. 1980); see also *In the Matter of the Application of Union Electric Company*, Commission Case No. EO-2002-351, Report and Order dated August 21, 2003.

¹⁸ *In Re Tartan Energy*, GA-94-127, 3 Mo. P.S.C. 3d 173, 177 (1994).

¹⁹ *Id.* at 189.

²⁰ See *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. 1993) and *State ex rel. Public Water Supply District No. 8 of Jefferson County*, 600 S.W.2d 147, 156 (Mo.App. 1980).

²¹ *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 35 (Mo. App. 2005).

²² *In Re Tartan Energy*, 3 Mo. P.S.C. at 177.

and the other factors to be examined by the Commission in connection with Aquila's application, nor is there any requirement that the evaluation of land use or zoning concerns, in particular, be the "functional equivalent" of a hearing on a special use permit or rezoning application. Even if there were such a requirement, the Commission concludes that it has been satisfied here.

The absence of specific rules setting out the factors to be used by the Commission in evaluating the appropriateness of the locations of the Facilities does not change this conclusion. There are no specific rules defining what factors are to be considered by the Commission in determining whether requested authority is "necessary or convenient for the public service."²³ Rather, the issues examined by the Commission to make such a determination have been developed in prior Commission and appellate decisions.

Notwithstanding the lack of such rules, the Commission has in the past been able to effectively consider applications for authority to build generation facilities. These instances have included the 1973 Commission proceeding involving Kansas City Power & Light Company's joint application with St. Joseph Light & Power Company to construct the Iatan Station in Platte County, Missouri.

Certificate cases involving power plants and substations are not unique. Until the 1980 *Union Electric* case wherein this Commission held that "it is not necessary for electric utilities to come before us to obtain permission to build plant within their certificated areas,"²⁴ the Commission considered applications for authority to build within a utility's certificated territory. Recently, the Commission considered and approved the application of Missouri-American Water Company for a certificate of convenience and necessity to lease, operate, control, manage and maintain a new source of water supply in Andrew County. Although the parties to that case agreed that a certificate was only necessary for the portion of the project located outside Missouri-American's current service area, the same "necessary or convenient" standard of Section 393.170 was applied in that case as is to be applied to Aquila's application herein.

Perhaps most relevant to the case at hand is the 1973 Commission proceeding wherein Kansas City Power & Light Company ("KCPL") and St. Joseph Light & Power Company ("SJLP") filed their joint application pursuant to 393.170 requesting certificates of public convenience and necessity to construct and operate Iatan Station in Platte County, Missouri. The proposed facilities were within SJLP's service territory, but outside KCPL's service territory. After hearings, in November of 1973, the Commission issued its Report and Order in Case No. 17,895 granting the requested certificates. Although land use issues were addressed by the applicants and the Commission, county zoning was not viewed as a prerequisite to granting the requested authority.

The Report and Order granting the certificates of public convenience and necessity was issued by this Commission on November 14, 1973, when the subject property was still zoned "agricultural." KCPL and SJLP did not seek a change in zoning until March of 1974, and Platte County did not approve the change until April of 1974.

²³ *Id.*

²⁴ *In re Union Electric Company*, 24 Mo.PSC (NS) 72, 78 (1980).

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In reviewing a condemnation issue related to Iatan Station, the Court of Appeals stated that “the joint application of KCP&L and SJL&P for rezoning of the property was neither a prerequisite to the project, nor necessary to it.”²⁵ The Court continued by stating:

. . . although rezoning was unnecessary for construction of the generating plant, KCP&L and SJL&P sought the rezoning. The evidence shows that from the inception of the Iatan project KCP&L’s power sales staff promoted sales to firms which would locate at or near the project site. . . . A fair conclusion from this and similar evidence is that KCP&L sought rezoning not to construct the plant itself, but to enable it to surround itself with satellite customer industries. The rezoning, then, was necessary not to generate electricity, but to generate business.²⁶

Dealing with Section 393.170 and the zoning exemption contained in Section 64.620,²⁷ the Western District Court of Appeals has held as follows:

Although Platte County is authorized by §64.620 to restrict the use of land within the county, that is, zone the land as it deems advisable, that section provides as well that the powers granted “shall not be construed . . . to authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission . . .” The public service commission is specifically empowered in §393.170 to grant permission and approval for construction of an electric plant “whenever it shall . . . determine that such construction . . . is necessary or convenient for the public service.” **These sections, taken together, necessarily mean that the county could not have interfered with the construction of the Iatan Plant by means of its zoning regulations.**²⁸

The Court also noted that its holding was consistent with a Supreme Court of Missouri case which held that a county cannot by zoning restrictions limit the use

²⁵ *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 561 (Mo.App. W.D. 1983).

²⁶ *Id.*

²⁷ Section 64.235 applies to first class nonchartered counties and requires construction in Cass County to conform to the County’s plan, but specifically states that the statute shall not “interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission. Section 64.620 applies to building restrictions for second and third class counties and also states that the statute shall not be construed to “authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission.”

²⁸ *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555 (Mo.App. W.D. 1983) (emphasis added).

of land by a public utility to construct a power plant to generate electric energy for public use.²⁹ In the *Saale* case, the Missouri Supreme Court stated:

When the purpose of this exception to the powers granted by the enabling act is considered, it is obvious that the intent and purpose of the legislature was that a county which adopts and approves a county plan for zoning, as authorized by Sections 64.510 to 64.690, cannot by zoning restrictions limit or prohibit the use of land by a public utility to provide authorized utility services. This would necessarily include the use of land by a public utility to construct a power plant to generate electric energy for distribution to the public.³⁰

The facts in the case recited above call into question the enforceability of Cass County's zoning. Both state law (Sections 64.231 and 64.261) and the County's Zoning Order and Subdivision Regulations require the maintenance of an "official zoning map."³¹ Municipalities have the same requirements under Chapter 89, and it has been held that a failure to attach or record a zoning map that has been incorporated into a zoning ordinance invalidates the ordinance.³² The maintenance of an official zoning map as a required part of a valid zoning ordinance (city or county) would likewise appear to require that the recorded and attached zoning map be accurate and current as of the date the ordinance is adopted. Cass County witness Peshoff testified that Cass County's zoning map stopped being current in 1999, and that his firm is involved in updating it.³³ Given the purported significance of this issue, the activities of the County in this regard are inexplicable.

Nevertheless, the Commission need not make any conclusion of law regarding the enforceability of Cass County's zoning to make its decision in this case. The foregoing issues weigh against deferring to Cass County for siting the facilities at issue in this case. Cass County's current land use plan and zoning ordinance, as well as its prior plans and ordinances, are part of the many factors the Commission weighed in determining whether to grant Aquila the certificates of convenience and necessity it requests.

The Commission concludes that it is no less capable than Cass County to consider land use concerns. As the Missouri Supreme Court has recognized, "the statutes relative to the Public Service Commission constitute a 'legislative recognition that the public interest and proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an

²⁹ *Union Elec. Co. v. Saale*, 377 S.W.2d 427 (Mo. 1964).

³⁰ *Id.* at 430.

³¹ See Ex. 119, p. 27.

³² See *Casey's General Stores v. City of Louisiana*, 734 S.W.2d 890, 896 (Mo. App. 1987).

³³ Tr. Vol. 10, p. 1615.

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agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the state.”³⁴ Without such a system “chaos would result.”³⁵

The Public Service Commission Act and the exemptions from county zoning found in Chapter 64 are legislative recognitions that the Commission is not only capable of examining any land use issues associated with Aquila’s application, but is the preferred authority to do so, free from local political restraints. In this instance there have been three local public hearings and six days of evidentiary hearings with respect to the Facilities at which current conditions, concerns and issues, including zoning, were considered. This is in contrast to the more abridged process that occurs before the Cass County Planning and Zoning Board and Board of Adjustment. In this regard, the Commission’s process has been more than the “functional equivalent” of the process involving a special use permit or rezoning application before the County.

Section 393.170 provides that an electrical corporation shall not begin construction of an electric plant “without first having obtained the permission and approval of the commission.” That statute, however, does not impose a restriction on the Commission that would prevent the issuance of the requested authority. Moreover, while Commission precedent is not *stare decisis*, it appears this Commission has given such retroactive authorization in the past. In its 1973 Report and Order authorizing Missouri Power & Light to construct a combustion turbine in Jefferson City, Missouri, the Commission stated, “At the time of the June 5[, 1973] session of the hearing, no complaints concerning noise had been voiced by any residents of the Schellridge Subdivision.”³⁶ This statement implies that the combustion turbine was operating before the Commission issued its report and order.

In addition, Section 393.130 requires every electrical corporation to furnish and provide safe and adequate instrumentalities and facilities. Section 393.140 then confers upon the Commission broad supervisory powers and provides that the Commission shall have general supervision over all electric utilities and electric plants, with the power to order reasonable improvements to the property of electrical corporations. The Commission concludes that Sections 393.170 and 393.140 each independently authorizes it to issue the type of certificate of public convenience and necessity or order contemplated by Section 64.235. In addition to powers expressly conferred upon the Commission by statute, it, by inference, is also vested with all other powers necessary and proper to carry out fully and effectively the duties delegated to it.³⁷

³⁴ *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 482-83 (Mo. 1973) (quoting *In re Public Service Elec. & Gas Co.*, 173 A.2d 233 (N.J. 1961)).

³⁵ *Id.* at 483; see also, *Union Elec. Co. v. City of Crestwood*, 562 S.W.2d 344, 346 (Mo. 1978) (application of zoning ordinances to intercity transmission line invaded area of regulation and control vested in Commission).

³⁶ *In re Missouri Power & Light Company*, 18 MoPSC (NS) 116, 118, Case No. 17,737 (Report and Order dated July 27, 1973).

³⁷ *State ex rel. Public Service Commission v. Padberg*, 145 S.W.2d 150 (Mo. 1940).

Conditions

Section 393.170.3 allows the Commission to impose on certificates of convenience and necessity such condition or conditions "as it may deem reasonable and necessary." Any such conditions, in addition to being reasonable and necessary, must also be allowed by law.

The Staff recommended the Commission impose six particular conditions on a site specific certificate of convenience and necessity for the South Harper Facility, but Staff stated four of those conditions had been satisfied. The Commission concludes the following conditions, which include the two the Staff was unable to state were satisfied, are reasonable, necessary, and lawful and will address certain concerns and issues. As such, the certificate of convenience and necessity granted to Aquila will be conditioned as follows:

1. Roads on the site must be worked on at least weekly to repair any ruts or holes, and dust abatement measures must be adopted for unpaved roads.
2. Sound abatement measures must be fully utilized and maintained (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer).
3. Emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood.
4. Security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort.
5. Security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would impact the surrounding area.
6. No construction or modification of the existing South Harper Facility shall be done in preparation for adding any generating unit(s) to the site before obtaining a certificate of convenience and necessity from the Commission to add the unit(s).
7. Emissions from the South Harper Facility affecting air quality must comply with all federal and state permit requirements.

The record reveals that Aquila is satisfying conditions 1, 2, 4, 6 and 7. Aquila shall comply with conditions 3 and 5 and demonstrate to the Commission its compliance with those conditions.

Certain parties have requested that the Commission condition the grant of a certificate on the Company obtaining county zoning approval. The Commission concludes that such a condition would be contrary to law, unreasonable, and unnecessary. If Aquila has specific Commission approval for the Facilities, the Company is exempt from local zoning under Section 64.235. It would be nonsensical to require that before the Commission can give specific approval for the Facilities, Aquila must show that it has obtained local zoning approval. Such circular reasoning would render the exemption in Section 64.235 meaningless.

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It was also requested that Aquila be required to provide a pool of resources to be made available for residents to make claims against for alleged devaluation of their property. The Commission concludes that it lacks the authority to impose such a condition.

In response to a party's proposed condition that a utility be required to compensate property owners for diminution in value to their property and to fully compensate them for economic losses caused by the existence of a transmission line, this Commission previously stated that the proposed condition was clearly outside the Commission's jurisdiction.³⁸ Decisions of the Missouri Supreme Court support this conclusion: "The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund."³⁹ This Commission will not require that Aquila set aside a pool of money, from any source, to compensate landowners. The Commission further concludes that such a condition would be unnecessary and unreasonable.

It was also requested that the Commission impose conditions that "must be so substantive as to deter Aquila and any other utility from taking this course in the future" and would "address and fully satisfy concerns regarding decreased property values, noise, aesthetics, nuisance, pollution, safety, road damage and traffic." These generalized suggestions fail to set out what actual, tangible concerns are at issue and provide no means by which this Commission could make a determination as to the reasonableness of the conditions. As such, the Commission concludes that it would be inappropriate to attempt to fashion any such conditions.

Discussion

Aquila submitted a list of issues for determination by the Commission. Staff concurred in Aquila's list. Cass County submitted a different list of issues.

Aquila filed its application under Section 393.170, RSMo. Aquila's list of issues relies more heavily on that statute than does Cass County's list. The Commission will, therefore, articulate the issues as Aquila has, which is as follows:

1. Does the Commission have the jurisdiction to consider the application?

StopAquila argues that Aquila must first obtain Cass County zoning approval for the facilities at issue here because, under Section 393.170.2, Aquila is required to show it has received "the required consent of the proper municipal authorities." However, Section 393.170 provides two kinds of certificate authority – subsection 1, authority for a public utility to construct an electric plant, and subsection 2, authority to serve a territory.⁴⁰

³⁸ *In re Union Electric Company*, Case No. EO-2002-351, 229 P.U.R.4th 148 (Report and Order issued August 21, 2003)).

³⁹ *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 668 (Mo. 1950) (citing *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37, 46 (Mo. 1931) (remaining citations omitted)).

⁴⁰ *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960); *Aquila*, 180 S.W.3d at 33.

Aquila's application is a request for a certificate of convenience and necessity under Section 393.170.1.⁴¹ Section 393.170.2, which contains the local consent requirement and which StopAquila urges the Commission to apply here, is simply inapplicable to this case. Sections 393.170.1 and 393.170.2 are not interchangeable.⁴² Subsection 1 "sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate. . . . The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority."⁴³ Simply put, the local consent requirement in subsection 2 applies only to applications for area certificates, not to applications under subsection 1, as is the case here.

Further, even if Aquila were obligated to make such a showing, Aquila received the type of local consent contemplated by subsection 2 when, in 1917, and pursuant to what later became Section 229.100, the Cass County Court granted Aquila's predecessor the right to utilize county rights of way.⁴⁴ "Utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen."⁴⁵ The Supreme Court of Missouri has stated that ". . . the permission granted by a county court pursuant to Section 229.100 . . . to a public utility to use the county roads is a 'county franchise,' supplying the consent required by Section 393.170."⁴⁶

According to Cass County, timing of Commission or county review of a proposal to build a power plant is critical under Section 393.170.1. The plain language of the statute confirms that the Commission is powerless to issue a certificate under Section 393.170.1 unless it convenes a public hearing contemporaneously with the request to construct, not after construction. The legislature requires a hearing on the proposal "before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation." *Cass County*, 180 S.W.3d at 37.

That same opinion, however, stated that even though it affirmed the trial court's injunction against Aquila, ". . . we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate."⁴⁷ The Court of Appeals understood that the plant was already built, and discussed at great length the

⁴¹ *Aquila*, 180 S.W.3d at 35.

⁴² *State ex rel. Union Elec. Co. v. Public Service Comm'n of Mo.*, 770 S.W.2d 283, 285 (Mo.App. 1989); *Aquila*, 180 S.W.3d at 33, 35.

⁴³ *Union Elec. Co.*, 770 S.W.2d at 285.

⁴⁴ The 1917 franchise was presented to the Commission as part of the application in Case No. 9470 pursuant to what is now Section 393.170.2, resulting in the Commission's issuance of the 1938 area certificate under which Aquila now serves most of Cass County, as well as several other counties. See also Appendix 6 to Aquila's application in Case No. EA-2005-0248. The Commission takes administrative notice of this franchise.

⁴⁵ *Union Elec. Co.*, 770 S.W.2d at 285.

⁴⁶ *State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964)(quoting *In re Union Elec. Co.*, 3 Mo. P.S.C. (N.S.) 157 (1951)).

⁴⁷ *Aquila* at 41.

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portion of Section 393.170 which requires pre-construction approval. Aquila cannot get pre-construction approval for the plant and substation. The Court of Appeals knew this, yet expressly stated that Aquila could still seek authority to operate the already built facilities. The Commission concludes, based upon the Court of Appeals final sentence of its *Aquila* opinion, that Aquila is not too late.

Also, the Western District said that a Commission order granting a service territory to one utility does not function as the “specific authority” required for the construction of an electric plant under Section 393.170.1 in derogation of county zoning authority.⁴⁸ That implies that “specific authority” does function in derogation of county zoning. Again, such grant of specific authority would be under Section 393.170.1, which is distinct from subsection 2 authority.

Further, the Western District stated that county zoning statutes also give an exemption to county zoning if a utility gets permission from a county commission.⁴⁹ The Court footnoted that sentence and italicized the last portion of Section 64.235.⁵⁰ Therefore, the Court ruled that a utility may be exempt from county zoning either by a permit of the county commission after public hearing in the manner provided by Section 64.231, or by becoming “. . . specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission.” Indeed, earlier in that paragraph, the court stated

“(b)y requiring public utilities to seek Commission approval each time they begin to construct a power plan, the legislature ensures that a broad range of issues, including county zoning, and be considered in public hearings before the first spadeful of soil is disturbed.”⁵¹

The Court’s reference to “Commission”, means the Public Service Commission, not the county commission.⁵²

Moreover, the court stated that “. . . (b)ecause we find that Aquila qualifies for an exemption under section 64.235, and because Aquila did not seek a permit from the county commission before commencing construction of the South Harper plant and Peculiar substation, we must determine whether it has been authorized by the Commission to build these facilities and, thus, is exempt.”⁵³ The exemption discussed is not an exemption merely from a county planning board; it is an exemption that would allow Aquila to build if authorized by the Commission, even “in derogation of county zoning”, as discussed above.⁵⁴

2. Is the authority requested by Aquila necessary or convenient for the public service?

⁴⁸ *Aquila* at 34 (emphasis supplied).

⁴⁹ *Id.* at 37 (emphasis supplied).

⁵⁰ *Id.* at 37, fn. 14.

⁵¹ *Id.*

⁵² *Id.* at 27.

⁵³ *Id.* at 32.

⁵⁴ Even Cass County’s witness Peshoff testified that land use regulations should apply unless there is an “explicit express exemption.” Tr. Vol. 5, p. 1507.

Necessary and convenient means that an additional service would be an improvement justifying the cost and that the inconvenience occasioned by the lack of a utility is so sufficiently great as to amount to a necessity.⁵⁵ The Commission has articulated this standard as follows:⁵⁶

- Whether there is a need for the involved facilities and related service;
- Whether Aquila is qualified to own, operate, control and manage the involved facilities and provide the related service
- Whether Aquila has the financial ability for this undertaking
- Whether Aquila's proposal is economically feasible, and
- Whether the involved facilities and related service promotes the public interest

The Commission discusses elements one through four sufficiently in its Findings of Fact. The public interest element, however, requires further discussion.

Siting and Land Use

Staff witness Warren Wood lists a ten-step process for determining a reasonable site for a natural gas-fired simple-cycle electric power plant. Those steps follow:

- 1) Identification of areas within a utility's service territory where significant energy usage is occurring and areas where energy usage is expected to increase;
- 2) Identification of areas noted in step (1) that are not in close proximity to existing generation facilities, are near an existing generation facility that will likely be retired in the near future, are near an existing generation facility that has room for additional generation units, or are near an area where required energy needs are expected to significantly exceed an existing generating facility's capabilities;
- 3) Identification of major natural gas transmission pipelines that have sufficient available capacity, adequate pressure and access to natural gas supplies to serve such a prospective generation facility and pass through the areas identified in step (2);
- 4) Identification of electric transmission lines that have sufficient available capacity, or can be reasonably upgraded, to serve such a prospective generation facility, provide transmission to the areas that need to be served by the planned generation facility and pass through the areas identified in step (2);
- 5) Identification of areas where the natural gas transmission pipelines in step (3) and the electric transmission lines in step (4) come within a reasonable distance of each other;

⁵⁵ *In re Timber Creek Sewer Company*, Case No. EE-99-202, 8 Mo. P.S.C. 3d 312, 314.

⁵⁶ *In re Tartan Energy*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173, 177.

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- 6) Review county plat books for the areas identified in step (5) to determine if there are properties in the areas identified in step (5) that appear suitable for such a prospective generation facility and begin visiting with landowners to determine ability to purchase potential parcels of land for such a prospective facility;
- 7) Carefully evaluate each of the potential sites identified in step (6) for line-of-site population density, natural buffers between the generation facility and nearby residents or the ability to construct buffers, natural gas pipeline extension cost, transmission line upgrade and extension costs, land acquisition cost, suitability of geology for construction of generation facility foundations, emissions compliance cost, possible air or land permitting problems, access to other needed infrastructure such as water and other potential costs to address potential concerns of the nearby communities and residents;
- 8) Communicate with any nearby communities and residents to receive feedback on concerns with construction of the planned generation facility in the area;
- 9) Address concerns of the nearby communities and residents to the greatest extent possible associated with the “optimal site”; and
- 10) If the concerns of the nearby communities and residents cannot be addressed at the “optimal site”, go back to step (6) to determine if another site is reasonable and repeat the steps after step (6), unless there are reasons why going back to step (6) is not reasonable.⁵⁷

Comparison of Staff witness Wood’s “major steps” with factors the Commission has considered in granting certificates of convenience and necessity to build a power plant reveals that Mr. Wood’s step one considers the factors of comparing where load arises and is increasing relative to the location of the proposed plant. Step two considers the factor of the location of the proposed plant relative to other existing power plants. Steps three and five consider the availability of infrastructure to supply fuel, while steps four and five consider the availability of infrastructure to transmit the generated power into the system. Step six deals with land acquisition—an issue unlikely to arise in a case where a utility is seeking authority to build a plant on a site for which it had not yet acquired ownership rights. Step seven considers the factors of population density near the site, aesthetic impact of the power plant on the area surrounding it, the geology of the site, environmental impacts, zoning, planned land use and noise. Steps eight and nine consider input from nearby communities and residents and responses to them, which address land use near the site.

Cass County is an area with rapidly increasing population and energy demand so that siting a power plant in Cass County would put the plant where Aquila’s load is increasing.⁵⁸ The location of the South Harper Power Plant is geographically diverse from Aquila’s other Missouri electric power generating plants. To address

⁵⁷ Ex. 19, pp. 6-8.

⁵⁸ Ex. 19, p. 10; Sch. WW-1, WW-2.

why Aquila should not simply have added more turbines to its Aries plant, Mr. Wood explains that two advantages of locating plants apart geographically are: reduced likelihood of losing power from multiple plants at the same time due to a common failure—for example inadequate fuel gas pressure, and reduced dependence on the same transmission paths to serve customers, which reduces load losses and the risk of overloading the transmission system.

Mr. Wood's rebuttal testimony shows the location of natural gas pipelines and transmission lines near the South Harper Power Plant with sufficient capacity to serve it. He testifies that the availability of two natural gas lines with sufficient capacity to serve the plant enhances power plant reliability and provides competition in sale of the fuel used by the plant. Cass County witness Peshoff stated that alternative locations to South Harper should include a builder's needs, size, access to infrastructure, including roads, water, and gas lines.⁵⁹ Mr. Peshoff conceded that his suggested alternatives to South Harper weren't necessarily better ones.⁶⁰

Land use in the vicinity of the simple-cycle generation plants Mr. Wood has seen includes sparsely populated agricultural, residential and industrial areas. The South Harper plant is in an agricultural area with a housing density that is rural in nature. This type of land use is not uncommon in the vicinity of these types of electric generation plants. In some cases, the population around these types of plants is relatively dense, approaching that of a residential area, but those often includes homes that were built after the generation plant was operating.

Mr. Wood further testifies that the South Harper Power Plant is located immediately adjacent to an interstate natural gas pipeline compressor station that was sited and built long before Aquila built the South Harper Power Plant. When Mr. Wood asked Cass County for its zoning map that defines zoning districts, the county was unable to produce the map and, therefore, the Staff stated that it is unsure of the zoning restrictions, if any, that apply to the South Harper Power Plant.⁶¹

Regardless of how, or if, the land is zoned, Mr. Wood states that most of the South Harper Power Plant is located within an area designated by Cass County in its most recent land use plan Multi-Use, including industrial uses.⁶² He further states that the Commission should use this most recent land use plan and zoning ordinance to evaluate Aquila's application.

As to the siting of the Peculiar substation, Staff witness testifies:

"The location of the South Harper Power Plant site drove the location of the 345 kV to 161 kV substation northwest of Peculiar. This substation was also located to minimize the needed right-of-way distance and to take advantage of an existing 69 kV right-of-way."

⁵⁹ Tr. Vol. 10, p. 1507.

⁶⁰ *Id.* at p. 1564.

⁶¹ Ex. 19, p. 23; Ex. 20, p. 3.

⁶² Ex. 20, pp. 4-5; see also Sch. WW-10.

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Staff witness Wood testifies that regardless of the South Harper Power Plant, there is a need for a substation at or near where the Peculiar Substation is sited.⁶³

In arriving at his conclusion that South Harper is at a reasonable site, Mr. Wood was not “locked into” a conclusion that the plant should stay simply because it was already there.⁶⁴ In fact, he concluded that location would be reasonable even if the plant did not already exist.⁶⁵ Furthermore, he stated it was reasonable for Aquila to continue to build despite the injunction, and that South Harper was a superior site to Camp Branch, which was a site Aquila previously sought for the combustion turbines.⁶⁶

Screening

Noise

Staff witness Bender addressed improvements Aquila made to the South Harper Power Plant site to screen the facility from sight and noise testing done of sound created by operating the generating units.⁶⁷ He related that the plant is visible from some neighboring properties and that sound from the plant did not exceed county ordinances or manufacturer guarantees. He stated that when vehicles passed on the roadway he could not hear the plant operating, and that sound levels measured when the plant is operating approximated the sound level of rustling leaves or a whisper, when measured about one-half mile from the plant. He provided schedules showing sound levels measured at different frequencies and distances from the plant.

StopAquila.org witness Stanley asserts that the noise studies that Aquila's noise study predicted violations of Cass County ordinances, and also failed to include offensive low-frequency noises.⁶⁸ According to Mr. Stanley, a noise study showing potential Cass County ordinance violations was inconclusive due to summer insects perhaps contributing to the noise.⁶⁹ In contrast, Aquila witness Andrews testified that its noise study showed Aquila complied with Cass County noise ordinances.⁷⁰ Aquila witnesses testified that the South Harper plant was not even running part of the time during those noise studies, that the noise could also come from the Southern Star gas compressor, and that there were several instances when the noise when the plant was not running was significantly higher than the noise when the plant was running.⁷¹

Based upon the evidence, the Commission does not find that the South Harper plant is unreasonably sited due to noise.

⁶³ Ex. 19, p. 27.

⁶⁴ Tr. Vol. 5, pp. 719, 894.

⁶⁵ *Id.* at pp. 826, 889.

⁶⁶ *Id.* at pp. 788-791, 900-901.

⁶⁷ Ex. 15, pp. 3-7.

⁶⁸ Ex. 26, pp. 11-14.

⁶⁹ Ex. 76.

⁷⁰ Ex. 7, p. 3-7.

⁷¹ Tr. Vol. 5, pp. 568, 588-589; Ex. 11, pp. 7-8.

Sightlines

Aquila landscaped the surrounding area with berms and roughly 1200 trees, and has left a 35-acre buffer between the plant and adjacent homeowners.⁷² Cass County's witness dismisses Aquila's landscaping as inadequate.⁷³ In addition to those some 1,200 trees, Aquila plant another 400 trees and 300 shrubs on private land with the design input of each individual family.⁷⁴ Based upon the evidence, the Commission does not find that the South Harper plant is unreasonably sited due to sightlines.

Property Values

Aquila stated that it purchased four homes from homeowners near South Harper. It has already sold two of them for near the purchase price.⁷⁵ StopAquila.org maintains that Aquila has taken huge losses on the sale of the two other homes.⁷⁶ The Commission will refuse to speculate what effect, if any, South Harper has on the value of any of these homes. Based upon the evidence, the Commission does not find that the South Harper plant is unreasonably sited due to a decrease in property values.

Pollution

StopAquila witness Stanley testified that South Harper could emit pollutants that are more than 1,000 times greater than a diesel pickup would emit.⁷⁷ The turbines could emit up to 558 pounds per hour of pollutants, as permitted by the Missouri DNR.⁷⁸ This evidence is in line with Aquila witness Andrews' testimony that Aquila operates within applicable environmental guidelines.⁷⁹ According to Aquila, two University of Kansas toxicologists concluded, "If not for the heat, standing in the center of the stack would result in an acceptable work environment" and "there could not possibly be any adverse health impacts to those living in the immediate vicinity."⁸⁰

StopAquila also complains that South Harper emits particulate matter, which can be extremely hazardous to human health.⁸¹ Of the emissions South Harper is allowed, particulate matter would be 18 pounds per hour, less than four percent of the total permitted emissions.⁸²

⁷² Ex. 11, p. 3; Ex. 10, p. 4.

⁷³ Tr. Vol. 10, pp. 1621-1622.

⁷⁴ Ex. 10, p. 5.; Ex. 11, p. 3.

⁷⁵ Ex. 11, p. 5.

⁷⁶ Ex. 91 (HC), Ex. 92 (HC).

⁷⁷ Ex. 26, p. 9.

⁷⁸ Id. at p. 7 (emphasis supplied).

⁷⁹ Ex. 7, pp. 2-4.

⁸⁰ Id. at p. 4.

⁸¹ Ex. 29, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule)*, 69 Fed. Reg. 4566 (proposed January 30, 2004).

⁸² Ex. 26, pp. 9-10.

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Of special concern to StopAquila is PM_{2.5}.⁸³ The portion of the maximum possible emissions of 18 pounds per hour that might be PM_{2.5} is unknown, because Aquila does not measure it.⁸⁴ Aquila does not measure it, because it is not required to under its environmental permit.⁸⁵ StopAquila claims that any amount of PM_{2.5} is dangerous.⁸⁶ While this may be true, the evidence is inconclusive whether South Harper will emit any PM_{2.5}. Furthermore, attributing PM_{2.5} to any one source would be impossible.⁸⁷ A Clean Air Task Force report that StopAquila.org submitted complained of pollutants from coal-fired plants, not from natural gas plants like South Harper.⁸⁸ Thus, the Commission is unwilling to conclude that South Harper emits an unreasonable amount of pollutants. The Commission will, however, condition Aquila's certificate upon Aquila's continual compliance with all pertinent state and federal environmental laws.

3. May such a certificate be conditioned and, if so, in what manner?

The Commission has authority under Section 393.170.3 to impose whatever conditions upon the certificate that it deems reasonable and necessary. The Commission will not impose a zoning requirement on Aquila, as that would defeat the purpose of the exemption in Section 64.235. The Commission may, however, consider zoning as a relevant factor in its decision.⁸⁹ In doing so, the Commission is mindful that the regulatory powers accorded the Commission, which ultimately answer to the public interest, "**must of necessity address conditions existing at the time the power is exercised . . .**"⁹⁰

A recent case, the AmerenUE Callaway-Franks transmission line case,⁹¹ involving the same statute, Section 393.170, was vigorously contested, and the Commission finds this case instructive. There, the Commission balanced all the relevant factors, both benefits and detriments, to determine whether the public benefits of AmerenUE's request outweighed the individual detriments.

As set forth in that case and in the Staff's prehearing brief in this matter, the Commission "must weigh the benefits and detriments to all the groups affected by its decision" in determining whether to issue to Aquila certificates of convenience and necessity for the South Harper Plant and the Peculiar Substation. The Commission should not ignore those individuals supporting the South Harper

⁸³ Ex. 29, 69 Fed. Reg. 4571 (highlighted not by the Commission, but presumably by StopAquila.org)(defining PM_{2.5} as particles with aerodynamic diameters smaller than a nominal 2.5 micrometers.

⁸⁴ Tr. Vol. 5, p. 600.

⁸⁵ *Id.* at 599-600.

⁸⁶ Ex. 29, 69 Fed. Reg. 4571.

⁸⁷ Tr. Vol. 5, pp. 599-601.

⁸⁸ Ex. 30, p. 1.

⁸⁹ Aquila, 180 S.W.3d at 37-38.

⁹⁰ *Id.* at 35 (emphasis supplied).

⁹¹ *In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage, and Pulaski Counties, Missouri* ("Callaway-FranksLine"), Case No. EO-2002-351, 12 MoPSC3d 174 (Report and Order dated August 21, 2003).

Plant, many of whom testified in favor of the plant at the local public hearings the Commission held on March 30 and April 6, 2006, nor should it ignore the support for the plant of the cities of Peculiar and Lake Annette, both located in Cass County.

As it did in the AmerenUE Callaway-Franks transmission line case, the Commission should not step into the Aquila's shoes as to management decisions nor should it require the South Harper Plant and Peculiar Substations be the "best" solutions; instead the Commission should independently determine whether each of Aquila's requests for authority to build the South Harper Plant and Peculiar Substation are in the public interest.

The land is now in a multi-tier use.⁹² Cass County encourages land in a multi-tier use area to be zoned commercial and industrial where major thoroughfare roads serve sites.⁹³ Cass County's zoning order contemplates allowing power plants in agricultural zones.⁹⁴

The Commission by statute may impose reasonable or necessary conditions and Staff witness Warren Wood recommends that the Commission should condition the site specific certificate of convenience and necessity for the South Harper Power Plant and associated substation as follows:

- (1) Roads must be repaired at the conclusion of work to equal or better condition than when Aquila first started working on this site.
- (2) Roads must be worked on at least weekly to repair any ruts or holes, and dust abatement measures must be adopted.
- (3) Sound abatement measures must be fully utilized (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer).
- (4) Emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood.
- (5) Security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort.
- (6) Security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would impact the surrounding area.

Mr. Wood states that Aquila has already satisfied conditions 1, 2, 3 and 5. Staff witness Leon Bender's rebuttal testimony provides details regarding Aquila's efforts to satisfy condition 3. Staff has not confirmed whether Aquila may have also satisfied conditions 4 and 6.

Among other suggestions presented at the hearing was a condition that Aquila create a pool of funds from which those claiming injury from erection of the South Harper Plant or Peculiar Substation might obtain compensation. When a similar proposal was made in the UE Callaway-Franks transmission line case, the Commission appropriately stated that such matters were within the purview of the courts because the Commission has no authority to grant monetary damages.

⁹² Ex. 14, pp. 5-10; Ex. 20, pp. 16-17; Ex. 22, pp. 10-11; Ex. 24, pp. 13-14.

⁹³ Ex. 108, Part 1, pp. 33-34, Ex. 118, pp. 32-33.

⁹⁴ Ex. 119, Part 2, p. 60.

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Aquila counsel Dale Youngs stated during the hearing that the neighbors represented by John Coffman in this case had brought civil actions against Aquila seeking compensation for damages resulting from the erection of the Facilities. Mr. Coffman, present during the statement, did not dispute Mr. Youngs' assertion. The homeowners are seeking legal damages from Aquila in the proper forum, which is circuit court.

Cass County asked Staff witness Wood about requiring zoning as a condition, who responded that the Commission should not impose that condition. When asked whether imposing a condition that roads should be brought to a grade satisfactory to Cass County, Staff witness Wood indicated that Aquila had already made significant improvements and that any condition should recognize that.⁹⁵ Terry Hedrick represented to Cass County that "[a]s per previous discussions, the road project will be designed and constructed under the direction of Cass County."⁹⁶

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes its findings of fact and conclusions of law. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

Decision

After applying the facts as the Commission has found them to be to its conclusions of law, the Commission has reached the following decision. The Commission has independently determined that Aquila's request for authority to build, own, and operate the South Harper Plant and Peculiar Substation is in the public interest. After evaluating all the relevant factors before it, including the availability of transmission, fuel, improved reliability, shortfall in generating capacity, growth in demand for electricity, Cass County's land use plan, Aquila's need for peaking capacity, the needs of the public as a whole (not just those of nearby landowners or Aquila's ratepaying customers), proximity of the South Harper Facility to other generating sites, surrounding land use, environmental impacts, population density near the site, financial impacts on Aquila and impacts on other utilities, the Commission concludes the Facilities and related service, and Aquila's ownership and operation of the same, will promote the public interest.

The evidence clearly demonstrates that there is a need for the Facilities and related service and that Aquila is fully qualified, from both a financial and operational standpoint, to own, operate, control and manage the Facilities. The evidence also demonstrates the economic feasibility of the project and that Aquila's ownership and operation of the Facilities and provision of the related service through the improvements to its property will promote the public interest. This Commission has previously established that the public convenience and necessity is served by Aquila's extension of its electrical facilities and services throughout those areas of Missouri, including Cass County, currently served by the Company. The Facilities

⁹⁵ Tr. Vol. 6, p. 797.

⁹⁶ Ex. 129.

have been constructed and have operated successfully. The construction of the South Harper Facility and Peculiar Substation has been fully funded, and Aquila has suffered no impairment to its credit as a result.

The construction of the South Harper Facility is consistent with and integral to Aquila's Integrated Resource Plan. Actual experience has borne out Aquila's need for the capacity produced by the plant. During the months of July through December of 2005, the South Harper Facility was fully operational and was used for a total of 429 hours on 57 days, representing nearly 74,000 MWh of power generation for Aquila Networks-MPS system customers.

The location of the South Harper Facility is desirable because of its relative proximity to the load center of the Western side of the Aquila Networks-MPS service area, existing electrical transmission facilities and the availability of fuel from natural gas pipelines. For reliability purposes, the most appropriate self-build option for Aquila is a facility near the center of the load growth of the Company's system, i.e., Cass County, Missouri. Aquila has conducted extensive site evaluation studies in Cass County and has not identified any site that is more suitable in terms of infrastructure than the site of the South Harper Facility.

Construction of generation outside the load center or purchasing capacity from outside Aquila's system would result in higher costs, less reliability, and greater impact on land use through miles of additional transmission structures and facilities that Aquila currently has the authority to construct. The evidence also demonstrates that the sites of the Facilities are compatible with surrounding land uses. The record in this proceeding demonstrates that it will promote the public interest for Aquila to continue operating the Facilities and that Aquila satisfies the factors set forth in *In Re Tartan Energy, State ex rel. Intercon Gas, and StopAquila.org v. Aquila, Inc.*

In constructing the Facilities without the "specific authority" deemed necessary by the Court of Appeals in *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005), the record reflects that Aquila did not intend to act in disregard for the law. In fact, the Commission concludes that in proceeding to construct the Facilities pursuant to its area certificates issued in Case Nos. 9470 and 11,892, Aquila acted in conformity with the Commission's prior decisions, long-standing policy, interpretation of prior Appellate Court opinions, and the decision in Case No. EA-2005-0248.

Pursuant to Commission Rule 4 CSR 240-3.105(1)(B)(2), a company seeking authorization to build an electric power plant is required to file the plans and specifications for the complete construction project and the estimated cost of the project. While Aquila had made available this information to all parties in this case, Aquila sought to avoid duplicating this information and requested a waiver of 4 CSR 240-3.105(1)(B)2, and the Commission hereby concludes that such a waiver should be granted and waives said requirement. The Commission concludes that, with its application filed herein, Aquila satisfied the requirements of Commission Rule 4 CSR 240-3.105(1)(B).

IT IS THEREFORE ORDERED THAT:

1. Aquila, Inc., is granted a waiver from the requirement of 4 CSR 240-3.105(1)(B)2.

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2. Under Section 393.140 and/or Section 393.170, RSMo, Aquila is hereby specifically authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage public improvements consisting of electric power production and related facilities, including three (3) 105 MW natural gas fired combustion turbines, and an associated transmission substation, as well as all facilities, structures, fixtures, transformers, breakers, installations, and equipment related thereto at the following described location in Cass County, Missouri:

The Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section Twenty-Nine (29), and the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32) containing approximately 74 acres at or near the intersection of 243rd Street and Harper Road.

3. Under Section 393.140 and/or Section 393.170, RSMo, Aquila is hereby specifically authorized and permitted and a certificate of public convenience and necessity is hereby granted, to construct, install, own, operate, maintain, and otherwise control and manage public improvements consisting of an electric transmission substation together with any and all other facilities, structures, fixtures, equipment and installations related thereto at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW1/4) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW ¼ a distance of 2,508.18 feet more or less to the South line of said NW ¼; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning containing approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road.

4. The construction of the Facilities by Aquila is hereby specifically authorized, permitted, approved, ratified, and confirmed.

5. The ownership, operation, control, and management of the Facilities by Aquila on a prospective basis is hereby specifically authorized and permitted.

6. As conditions on the grants of authority provided for in ordered paragraph 2 above: (a) roads on the site must be worked on at least weekly to repair any ruts or holes, and dust abatement measures must be adopted for unpaved roads; (b) sound abatement measures must be fully utilized and maintained (stack attenuation, turbine acoustical enclosures, berms, trees, and strict adherence by Aquila to the sound limits in its contract with the manufacturer); (c) emergency horns and sirens must be focused to the attention of site personnel and not the entire neighborhood; (d) security patrols must be very carefully conducted to only oversee Aquila's resources and not increase traffic in areas not associated with this effort; (e) security lighting of the completed facility must be subdued and be specifically designed to minimize "sky shine" that would have an impact on the

surrounding area; (f) no construction or modification of the existing South Harper Facility shall be done in preparation for adding any generating unit(s) to the site before obtaining a certificate of convenience and necessity from the Commission to add the unit(s); and (g) emissions from the South Harper Facility affecting air quality must comply with all federal and state permit requirements.

7. All pending motions are denied.
8. This Report and Order shall become effective on May 31, 2006.
9. This case may be closed on June 1, 2006.

Davis, Chm., and Murray, CC., concur;
Appling, C., concurs, with separate
concurring opinion attached;
Gaw and Clayton, CC., dissent, with
separate dissenting opinions to follow;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

CONCURRING OPINION OF COMMISSIONER LIN APPLING

I support this order because it reaches a reasonable result, consistent with applicable laws and the record evidence available to the Commission. The Commission's duty was to determine the public interest at stake in this case, and I am confident that we achieved that goal.

In my opinion, this order confirms the Commission's standard practice and affirmations, including: the Public Service Commission's November 5, 2004 letter advising Nanette L. Trout that Aquila, Inc.'s existing certificates of convenience and necessity conferred the authority needed to build generation in its existing service territory; the Commission's April 7, 2005 order clarifying the adequacy of Aquila's certificate authority (EA-2005-0248); and decades of similar findings made by our predecessors.

Until the Western District of Court of Appeals issued its December 20, 2005 opinion in *StopAquila.Org v. Aquila, Inc.*, there was no reason for the Commission *not* to rely on this history. (S.W.3d 24 (Mo. App. 2005)) Given that holding, I would advise any electric utility that wants to build new generation in its existing service territory, out of an abundance of caution, to seriously consider seeking specific authority for its project.

As this order notes, the Western District's opinion found that Aquila built its facility without having proper authority, that it is exempt from Cass County zoning and that it had the option to seek specific authority from either Cass County or the Commission. Aquila chose to come here. The Commission made its decision.

I agree with the majority that there is a need for Aquila's new generation; that it will contribute to safe and reliable service for its customers and for the rest of the grid upon which all of us depend; and that there is no compelling reason to deny the company's request for a certificate of convenience and necessity. It is in the public interest for *all* of us to learn from this experience.

For these reasons, I respectfully concur.

**DISSENTING OPINION OF COMMISSIONERS
ROBERT M. CLAYTON III AND STEVE GAW**

We dissent from the majority Report and Order granting Aquila a Certificate of Convenience and Necessity to construct the South Harper facility. Throughout this case, Aquila has consistently taken action without necessary regulatory approval only to ask for permission after the fact. This strategy has resulted in the filing of multiple cases before the Missouri Public Service Commission (Commission or PSC), various challenges at the Circuit Court, two ongoing cases before the Western District of the Missouri Court of Appeals, and so far, one case ultimately transferred to the Missouri Supreme Court.¹ The controversy surrounding the construction of the facility and its accompanying financing has enveloped a significant amount of resources by state and local governments, the company (its shareholders and potentially its ratepayers), as well as local residents who have defiantly—and often successfully—fought the siting, development, construction, and operation of the power plant.

While much of the blame in this case can be attributed to Aquila, there is plenty of responsibility to be passed around to others, including the Missouri Public Service Commission and its Staff. At times Staff has acted as a willing participant in assisting Aquila from the beginning of the process, and during parts of the litigation,² by not critically and independently reviewing the facts and assessing the impact on all concerned parties to reach an impartial conclusion. The Commission itself has encouraged that behavior through its Orders,³ allowing the construction, financing and operation of the plant in spite of local opposition and in defiance of judicial orders.⁴

The case at hand raises many issues that must ultimately be decided by a court of law with the authority to clarify the interpretation of statutes and cases on which the Commission, Missouri citizens, and utilities rely when addressing the construction of power plants. The lack of clarity in the applicable statutes requires the Court to design a roadmap for this and future cases. Without clarification, the precedent established by the majority will permit the Commission to hastily invade the province of county government's land use expertise and the authority given to it by the Missouri Legislature. These Commissioners disagree with this inappropriate interpretation of Commission jurisdiction and local zoning authority in the absence of specific legislative direction.

¹ See, PSC Case Nos. EO-2005-0156, EA-2005-0248 and EA-2006-0309; Case Nos. CV104-1443CC, CV105-558CC, 06-CA-CV-01698, WD 6500 and SC87302; *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App., W.D. 2005).

² See, Exhibits 15 - 20.

³ EA-2005-0248, Order Clarifying Prior Certificates of Convenience and Necessity. The Commission vacated EA-2005-0248 on March 7, 2006, pursuant to the February 28, 2006, Circuit Court of Cass County's Consent Judgment directing the Commission to set aside and vacate its April 7, 2005 Order.

⁴ See, Case No. CV104-1443CC (Cass County); *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App., W.D. 2005).

DOES THE PSC HAVE JURISDICTION OR AUTHORITY TO GRANT A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR A PREVIOUSLY CONSTRUCTED POWER PLANT?

The initial question in this case involves the interplay among various provisions of Missouri law, including land use planning and zoning statutes found within Chapter 64 and the relevant Missouri Public Service Commission provisions found in Chapter 393, RSMo.⁵ The zoning statute at issue, §64.235,⁶ permits Cass County's Planning Board to exert zoning authority over new construction. However, the section provides that certain developments may avoid this requirement if appropriately authorized by the PSC or the County Commission pursuant to §64.231. Conflicting interpretations of these provisions has produced uncertainty about the appropriate process to use when an electric generation facility is proposed to be sited in an area for which it is not properly zoned. We believe that the majority opinion misapplied the law in arriving at a decision which will lead to future confusion.

The Western District Court of Appeals clarified the relationship of the two statutory provisions in its most recent decision on the request to permanently enjoin Aquila from proceeding with construction of the South Harper facility. *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App., W.D. 2005). The Court specifically delineated the power of the Missouri Public Service Commission to site power plants prior to construction, pursuant to §393.170.1, reversing the Commission's interpretation of *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo.App. 1960).⁷ Section 393.170.1 grants the Commission the authority to issue an Order Granting a Certificate of Convenience and Necessity for the specific authority to construct an electric plant. Specifically, §393.170.1 reads, "[n]o gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system

⁵ All references are to the Revised Statutes of Missouri (RSMo) 2000, unless otherwise specified.

⁶ The statute mandating adherence to local zoning laws is §64.235, which reads:

From and after the adoption of the master plan or portion thereof and its proper certification and recording, then and thenceforth no improvement of a type embraced within the recommendations of the master plan shall be constructed or authorized without first submitting the proposed plans thereof to the county planning board and receiving the written approval and recommendations of the board; except that this requirement shall be deemed to be waived if the county planning board fails to make its report and recommendations within forty-five days after the receipt of the proposed plans. If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning board may be overruled by the county commission, which shall certify its reasons therefore to the planning board, nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission after public hearing in the manner provided by section 64.231.

⁷ See, *Union Elec. Co.*, 24 Mo. P.S.C. (N.S.) 72 (1980). See also, Dissent of Commissioner Steve Gaw, Case No. EA-2005-0248.

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without first having obtained the permission and approval of the commission.” (emphasis added). Furthermore, §393.170.1 is the only statute referenced in the Western District opinion which gives the Commission the authority to approve the siting of power plants and is the only statute granting the PSC to “specifically authorize” a project from §64.235.

The Court found that the Area Certificates previously issued to Aquila by the Commission did not “specifically approve” the construction of the new power plant at issue in this case. In addition, because the County had not provided the necessary permission to construct the plant, the Western District upheld the Circuit Court’s permanent injunction. At the time, the complete impact of the Court’s ruling was not clear. This impact is now realized. Due to the South Harper facility’s violation of Cass County zoning, the plant must be dismantled, unless a legal remedy can be found to overcome the restriction. The Commission majority attempted to find this legal remedy to save the electric power plant, resulting in its flawed order, rather than focusing on determining the appropriate interpretation of the law.

The majority ignores the significance of the fact that the electric power plant was built before Aquila made its request of the Commission, a fact which we believe is critical in the analysis and decision of this case. Section 393.170.1 specifically provides that a utility must receive the Commission’s permission and approval prior to beginning the construction of an electric plant. The Court of Appeals wrote, “Aquila is seeking to build an electric power plant, a matter that is governed by section 393.170.1.” *StopAquila* at 35. This distinction between construction of the plant and its operation is the underlying theme found throughout this Court’s opinion. The Western District’s ultimate finding “affirm[ed] the circuit court’s judgment permanently enjoining Aquila from building the South Harper plant . . .” *Id.* at 41 (emphasis added).

As discussed later in this dissent, we believe that this Commission has the authority pursuant to §393.170, to override county zoning in the siting of electric plant. However, the Western District confirmed that the Commission’s power to grant a regulated utility permission to build a plant in a particular location under §393.170.1 exists only prior to the commencement of construction. The Court explained:

By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county’s master plan. (FN14) This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular

electric plant, take place in the months *before* construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission. *StopAquila* at 37 (emphasis added).

The Western District pointed out that the authority of this Commission is significant but not unlimited. This Commission may only act under its statutory authority because “[i]n all these things [the Public Service Commission] acts by virtue of the legislative authority with which it is clothed, and necessarily within the limits of the legislative power, for the stream cannot rise above its source nor the creature above its creator.” *StopAquila* at 34 (citing *Mo. Valley Realty Co. v. Cupples Station Light, Heat & Power Co.*, 199 S.W.2d 151, 153 (Mo.banc 1917)). We have not located any alternate statutes that act as a basis for pre-empting county land use control, thereby designating §393.170.1, the Commission’s limited statutory authority. Aquila’s attempt to obtain permission from the Commission after the power plant’s construction did not fall within this statutory authorization.

In its ultimate holding, the Western District made it very clear that Cass County was correct in its assertion that Aquila had not obtained the necessary authority to construct the South Harper facility:

The overriding public policy from the county’s perspective is that it should have some authority over the placement of these facilities so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. As the circuit court stated so eloquently, “to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants . . . The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities”.

For these reasons, we affirm the circuit court’s judgment permanently enjoining Aquila from building the South Harper plant and Peculiar substation in violation of Cass County’s zoning law without first obtaining approval from the county commission or the Public Service Commission . . . *StopAquila* at 41.

According to the literal and strict reading of the statute and the language of the Western District’s opinion, the Commission’s authorization is clearly not available to Aquila nearly a year after the unauthorized construction of the plant began. This Commission cannot statutorily authorize the siting of the South Harper facility and thus does not have the statutory license in this case to override the County’s authority.

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However, the Court in dicta seemed to imply that Aquila may have a remedy to its predicament. The Court added, as the last sentence of its opinion:

[i]n so ruling, however, we do not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation, which have already been built, to continue operating, albeit with whatever conditions are deemed appropriate. *StopAquila* at 41.

The parties have made various interpretations of this portion of the opinion. These include Cass County's argument that the Court gave no direction regarding the appropriate course of action for Aquila, but only suggested that if a remedy existed outside of that previously pursued by Aquila and ruled on by the Court, it was not constrained from pursuing it. However, the majority of the Commission concludes that the Court was declaring a path to a solution for Aquila. According to the majority, dicta from the Western District permits Aquila to receive the necessary permission to operate the facility from either Cass County or the Commission.

The majority's line of reasoning equates permission to operate the South Harper facility with authority to build it under §393.170.1. The majority's opinion ignores the distinction in the Court's opinion between construction and operation, and concludes that the Court was instructing Aquila to file a request with either the Commission or the County. The majority thereafter applies an analysis it believes would be appropriate in a siting case under §393.170.1, while ignoring that this section does not apply because the plant is already built.

The permission to operate the facility as discussed by the Western District is different from permission to construct pursuant to §393.170.1. The Western District declared that Aquila failed to secure the necessary permission to construct the plant from the County or the Commission. Thus, the Western District found that the trial Court's injunction would stand. It is from this finding by the Court that without such permission from the Commission or Cass County, the plant would be subject to being dismantled.⁸

Failure to comply with the requirements of Chapter 393 leads to a different type of consequences, presumably levied by the Commission. The consequences of not procuring Commission authority could involve penalties under Chapter 393 or 386, refusal of the Commission to recognize the plant in rate base and the loss of the authority of the Commission to preempt county zoning requirements.

Noncompliance with county zoning often means the violating structure must be removed. When the Western District stated that Aquila could pursue continued operations of the plant, it seems probable that the Court was not suggesting that such permission could be granted by the Commission to override County zoning; rather, it was referring to Aquila seeking permission from Cass County for a variance from zoning requirements.

⁸ While Aquila appears to have missed its opportunity to request that the Commission override the County's zoning requirement, it is the failure to abide by the zoning laws that has led to such a threat of dismantling, not the failure to follow the provisions of §393.170.

For the reasons that follow, these Commissioners believe that §393.170.1 does provide an opportunity to override county zoning when its provisions are followed. However, as previously stated, the door to this opportunity is closed.⁹

IF AQUILA HAD TIMELY REQUESTED PSC AUTHORITY TO CONSTRUCT THE SOUTH HARPER FACILITY, WOULD THE PSC HAVE THE POWER TO GRANT THE AUTHORITY CONTRARY TO COUNTY ZONING?

Despite our belief that the Commission lacks the legal authority under the facts in this case to override Cass County's zoning laws, we believe it is helpful to discuss the process that should occur when a utility properly seeks authority to site an electric plant prior to construction contrary to county zoning decisions. The Western District previously found that the area in controversy known as South Harper is zoned as agricultural by Cass County. Other than an electric plant or transmission owned by a regulated utility, there is no dispute that industrial facilities that are to be located in the area must make application to the appropriate county authority prior to construction.

While the Western District spent considerable time regarding the importance of zoning to the siting of an electric plant, the parties have continued to argue the issue in this case. Cass County and StopAquila maintain that the County has the authority to determine land use in the county and that both the utility and the Public Service Commission must respect its authority. Aquila, having lost in its previous interpretation of Missouri law regarding the siting authority of both public bodies, argues that the Commission can site a generation plant over a county's objection and without submitting a request to that county for a special use of the area. The majority opinion adopts the Staff view that the Commission can at any time override Cass County zoning without the county ever being given an opportunity to hear the matter. The majority further concludes that zoning is an insignificant factor in siting a generation facility. We disagree with the majority's analysis and conclusions.

The majority relies heavily on the testimony of the Staff witness, who compiled a list of factors he believed to be the important criteria in making a determination of the appropriate site for a power generating facility. His list was created after using a sampling of other states' criteria. Several states were used because of their proximity to Missouri while others had no relation or similarity to Missouri. According to the Staff witness, the states chosen by him did not see zoning as a significant issue and his summary of factors did not include land use planning or zoning as a priority. The Staff witness was asked directly about requiring zoning as a condition, to which he responded that the Commission should not impose any such condition.¹⁰ In testimony assessing the importance of zoning and the factors to be examined by the Commission, the following exchange took place with staff witness:

⁹ The Commission had an opportunity to dismiss this case based partially on the rationale listed in this section. These Commissioners supported the Order Denying the Motions to Dismiss filed by Cass County and StopAquila.org based on their desire to allow the parties to have a full evidentiary hearing in this case.

¹⁰ Tr. Vol. 7, p. 794.

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Q. In other words, would it be fair to say that Staff did not view a county's determination as to land use or a municipality's determination as to land use within their jurisdiction as an important factor in determining whether or not a site is ranked higher or lower?

A. No, it did not.

Tr. Vol. 7, p. 875.

While the Staff's disregard of the importance of zoning is reflected in the majority Report and Order, the Western District, in contrast, spent a significant amount of time in its opinion emphasizing the importance of zoning. The Western District explored the interrelation of zoning power and other governmental police power. *StopAquila* at 41. The Court made it clear that zoning is an important matter to be considered in a siting case. It rejected Aquila's arguments that Cass County zoning ordinances are unimportant and that proper zoning is not necessary in condemnation cases. As previously stated, the Court made this clear in stating "[b]y requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered . . ." (emphasis added) *Id.* at 37. Later in the opinion, the Court elaborated further and stated:

Aquila bolsters its contention that counties have no authority over the construction of an electric power plant by citing section 229.100, which Aquila contends prohibits a county from issuing a franchise for such construction. The statute is silent with respect to power plants and simply prohibits public utilities from erecting power lines "without first having obtained the assent of the county commission of such county therefore." Section 229.100. While counties may not have the authority to issue franchises as to the construction of power plants, there is nothing in this statute that precludes a county from exercising its zoning authority, if any, over the location of a power plant. *Id.* at 40.

The Court also addressed Aquila's contention that cases dealing with eminent domain prohibited the consideration of zoning. The Court stated that:

A public utility's power of eminent domain and a county's power to zone are derived from a legislative grant of authority. Both powers are police powers derived from statute and are without a constitutional basis, thus neither trumps the other, and both powers can be exercised in harmony. See, e.g., *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 642 (Mo.banc 1962) (harmonizing the adverse claims of two governmental units with equivalent authority regarding location of sewage disposal plant, court concludes that charter county's zoning ordinance restricting plant's location is lawful restriction stat-

ing, “the statutes upon which the city depends do not purport to give the city the right to select the exact location in St. Louis county, and the public interest is best served in requiring it to be done in accordance with the zoning laws.”). *Id* at 41.

Thus, if it is determined that the Commission has the authority to override a county zoning determination, the Commission must give significant weight to area zoning in making its decision.

When the provisions of §393.170.1 apply, a county’s zoning should not be overridden unless there is a finding of good cause that the public interest in siting the plant at the proposed location is greater than the public interest of the county’s zoning restrictions. An attempt should be made to balance these two public interests so as to avoid one subverting the other. The provision of safe and reliable electric service at just and reasonable rates is an important public interest. So, too, is the ability of a county or municipality to regulate the use of public land. It should be the goal of the Commission to satisfy both public interests. When possible, the Commission should defer to the determination of the county as to the appropriate land use for the proposed site. However, there may be occasions when it is not possible to satisfy both public interests, in which case the Commission must carefully evaluate the competing public interests and find the solution that does the most public good.

Thus, when such a decision is necessary, the lynchpin of a Commission override of a county’s zoning of a site should be a reason that is within the statutorily recognized expertise of the Commission. The Commission must determine that in order to provide safe and reliable electrical service to the customers of the utility at just and reasonable rates,¹¹ it is necessary for the public interest expressed in county zoning ordinances to be overridden. This analysis would appropriately entail an evaluation of other potential sites and alternatives for power. The Commission should not override the county’s appropriate determination for the use of land within its boundaries if other reasonable alternatives exist.

This approach reflects the significance of the county’s zoning while still allowing the Commission to override this interest in the event that other alternative sites do not meet the objective of safe and reliable service at just and reasonable rates. Furthermore, this process is consistent with other cases which suggest that the Commission review lies within its expertise in securing reliable electrical service.¹²

Under this analysis, a thorough review of all possible locations for the plant, without zoning issues, could be conducted. A determination would be made of the negative consequences of placing the plant at locations other than the site requested and whether these consequences were great enough to override the public interest and policy concerns of not complying with zoning. Such an analysis was simply not done in the majority opinion nor was there sufficient evidence in the record to conduct such an analysis.

¹¹ §393.130, RSMo. Supp. 2005.

¹² See, *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo.banc 1973).

We further note the zoning of a county does not represent an example of “not in my back yard” opposition as the majority opinion implies. The majority’s analysis is a misapplied balancing of public versus private interests when county zoning is not a private interest. It is a public interest reflected in state statutes and county ordinances, which should be given appropriate weight. It is among these public interests that the difficult decisions must be made. If a “private interest” can be found in the majority opinion, it is the interest of Aquila, which faced the most difficult of circumstances if the plant faced demolition. The majority found that “private interest” paramount in the overall analysis.¹³

While the Commission must face the difficult decisions in balancing public interests, the rights of private citizens are not to be taken lightly. The interference with private property rights including that of siting a generation unit is a serious and important matter both to the individuals involved and to public policy. The progress and economic development of the state is important but so are the rights of our citizens. Those who participate in the process have a right to a process that is fair, understandable, and balanced. Citizens deserve to know that the laws apply fairly to the individual citizen and the corporate giant. This is never more important or obvious than when these interests conflict with each other. The parties must abide by the law and face the consequences of its decisions.

We are also concerned about the process employed in this case. The parties had little guidance as to the factors which the Commission might use in deciding a siting case. The selection by Staff of criteria which were not available to the parties prior to the filing of this case (a case scheduled on an expedited basis) created an arguably unfair proceeding for which the parties opposing Staff’s position most certainly found difficult to prepare. This is especially the case since the majority adopted Staff’s position and its criteria for siting the facility. This Commission should delineate the factors that it will be considering in siting a power plant so that parties have guidance in preparing, presenting, and arguing such cases. These factors should include impact on neighborhoods, the environment and other concerns noted above. Other states have such guidelines set forth in rules and publicly available documents providing the public, utilities, and interest groups access to information on how difficult decisions on siting are made. The current lack of such information and failure to delineate factors to be considered contributes to the lack of trust and confidence that the decision process is fair and open. The Commission should act now to avoid future disputes. Finally, the record is simply incomplete for the Commission to make a reasoned decision on the hypothetical question of whether South Harper is the appropriate location in Cass County for a power plant. While the parties may have established several factors

¹³ It should be noted that neither the Staff nor the majority conducted a public interest evaluation of the site. Instead, they conducted a test to measure the reasonableness of the utility in its decision. In other words, according to the majority, the Commission should not evaluate the public interest of the site in balancing the public interests – rather it should conduct a prudence review of the utility’s decision in selecting it. Such an analysis focuses entirely on the decision-making process of the utility and improperly shifts the burden to other parties to prove that the utility was not prudent. Not only is the burden improperly shifted, the prudence test ignores equally important aspects of the public interest.

suggesting need for the generation and that Cass County was an appropriate location, in general, many questions remain.

CONCLUSION

The majority improperly relies on Staff's opinion in resolving the appropriateness of the South Harper site. Prior to the beginning of the South Harper facility construction and subsequent litigation, Staff was already working with Aquila to assist in advocating for this site. The majority's Report and Order is in fact a reflection of Staff's advocacy on behalf of Aquila. The lack of weight given to the zoning of the county coupled with the striking weakness in the study of other potential sites make the Report and Order in this case flawed.

The majority opinion consistently ignores the mistakes of this utility in pursuing this project. The failure of Aquila to plan and secure generation, it now claims is necessary, created a self-imposed deadline¹⁴ which it foisted upon those in Cass County, this Commission, and the courts.¹⁵ Aquila and Staff then used their urgent situation as a factor of siting at South Harper. Aquila's track record of mistakes and bad decision-making requiring solutions should not be grounds for bending the rule of law.

Each time Aquila made a mistake, it depended on others to find creative solutions to change or avoid the consequences of the rule of law. For example, in seeking to approve a transfer of the South Harper facility to the City of Peculiar for financing, Aquila misrepresented to this Commission that it awaited Commission approval to make the transfer when the transfer had already occurred; Aquila pursued the financing regardless of a pending court case in which it was found unlawful; Aquila sought the inclusion of the generation facility in its rates despite the fact that it was not "used and useful"¹⁶; Aquila continued construction of the plant despite a Court order to halt construction requiring the posting of bond and the risking of millions of dollars of ratepayer and/or shareholder money; and, most importantly, Aquila failed to work with the neighbors in the vicinity of South Harper until the situation was beyond repair. These Commissioners will not enable or endorse a utility's pattern of behavior that consistently puts its ratepayers and shareholders in jeopardy.

The focus on the South Harper location only occurred after stiff local opposition at Camp Branch. Other reasonable locations were arbitrarily rejected without full analysis. For example, the Aries facility at Pleasant Hill, despite proper zoning, adequate space, convenience to transmission and fuel lines and NO local opposition was barely even considered. The South Harper site was selected only because the residents surrounding the Camp Branch location complained loudly first. If South Harper had been the first location inspected and the local opponents involved here had spoken loudly first, the next location would have been chosen. As a consequence, the second selection of the Camp Branch site would have been forced on a different group of Cass County residents. Such an arbitrary decision-making process should not be embraced, but rather should be rejected by the Commission.

¹⁴ Tr. Vol. 7, p. 785.

¹⁵ Tr. Vol. 12, pp. 1744-1746.

¹⁶ Section 393.135: "fully operational and used for service".

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The list of potential site locations included several criteria in suggesting whether a site was appropriate or not. That list included an estimation of the litigation expenses associated with the processing of the necessary government approvals and addressing the concerns of citizens opposed to the plant. Other locations had a much higher calculation of litigation expense than the site located at South Harper which, in hindsight, has clearly proven erroneous.¹⁷ That entry on the comparative list can be summarized in a quote from Aquila's CEO, who stated that, "[t]he biggest mistake we made was we didn't listen to and respect our neighbors." *Kansas City Star*, May 4, 2006.¹⁸ If that respect and communication had been shown at the start of the process, the calculation of litigation expenses and headaches would have been far less, regardless of the specific location in Cass County.

For the foregoing reasons, we respectfully dissent.

¹⁷ Exhibit 19, Rebuttal Testimony of Staff Witness, Schedule WW-6a.

¹⁸ Exhibit 132.

**In Re: Name Change Request of Sprint Missouri, Inc., to Embarq
Missouri, Inc., d/b/a Embarq.**

*Case No. TN-2006-0416, consolidated
Decided May 24, 2006*

Telecommunications §1. The Commission approved a request, changing the name of Sprint, Missouri, Inc. to Embarq Missouri, Inc., d/b/a Embarq.

**ORDER RECOGNIZING NAME CHANGE
AND APPROVING TARIFF SHEETS**

On May 1, 2006, Sprint Missouri, Inc., filed an application with the Public Service Commission seeking a change of name from Sprint Missouri, Inc., to Embarq Missouri, Inc., d/b/a Embarq. Sprint included with its application adoption notices and revised tariff title sheets, effective June 4, 2006, for each of Sprint's tariffs:

- P.S.C. Mo. No. 10 – Exchange Boundary Maps
- P.S.C. Mo. No. 22 – General Exchange Tariff
- P.S.C. Mo. No. 23 – Message Telecommunications
Service Tariff
- P.S.C. Mo. No. 24 – Private Line Service Tariff
- P.S.C. Mo. No. 25 – Intrastate Wide Area Telecommunications
Service Tariff
- P.S.C. Mo. No. 26 – Access Services Tariff

The application also included the notices sent to customers regarding the name change and included evidence of the registration of the name change with the Missouri Secretary of State.

The Commission originally opened five cases addressing Sprint's tariffs and name change. Case Nos. TN-2006-0416, TN-2006-0417, TN-2006-0418, TN-2006-0419, and TN-2006-0420 were consolidated with the lead case designated TN-2006-0416. The Staff of the Commission filed a recommendation on May 12, 2006, advocating approval of Sprint's proposed tariffs and recognition of the name change. The Staff notes that the tariff pages submitted for approval propose no changes to service names, rates, terms, conditions, or promotions.

The Commission has reviewed Sprint's application, its supporting documentation, and Staff's recommendation and finds that the new name should be recognized and the proposed tariff sheets should be approved.

IT IS ORDERED THAT:

1. The name change from Sprint Missouri, Inc. to Embarq Missouri, Inc., d/b/a Embarq, is recognized.

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2. The following tariff pages, Tariff File Nos. YI-2006-0837, YI-2006-0838, YI-2006-0839, YI-2006-0840, YI-2006-0841 and YI-2006-0843, are approved to become effective June 4, 2006:

P.S.C. Mo. No. 10

Original Title Page 1 and Second Revised Adoption Notice Page

P.S.C. Mo. No. 22

Original Title Page 1 and Second Revised Adoption Notice Page

P.S.C. Mo. No. 23

Original Title Page 1 and Second Revised Adoption Notice Page

P.S.C. Mo. No. 24

First Revised Title Page 1 and Second Revised Adoption Notice Page

P.S.C. Mo. No. 25

Second Revised Title Page 1 and Second Revised Adoption Notice Page

P.S.C. Mo. No. 26

First Revised Title Page 1 and Second Revised Adoption Notice Page

3. This order shall become effective on June 4, 2006.

4. This case may be closed on June 5, 2006.

Steven C. Reed, Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

In the Matter of the Joint Application of Cass County Telephone Company, Limited Partnership, LEC Long Distance, Inc., d/b/a CassTel Long Distance, FairPoint Communications, Inc., FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance for Authority to Transfer and Acquire Cass County Telephone Company, Limited Partnership's and LEC Distance, Inc.'s Facilities or Systems Located in the State of Missouri; 2) for Issuance of Certificates of Service Authority to FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance; and 3) to Designate FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications as a Telecommunications Carrier Eligible to Receive Federal Universal Service Support.

Case No. TM-2006-0306

Decided May 30, 2006

Telecommunications §3.1. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is granted a certificate of service authority to provide local telecommunications service.

Telecommunications §4. The Joint Application for approval of the transfer and acquisition of the Missouri facilities and systems of Cass County Telephone Company, L.P., and LEC Long Distance, Inc., d/b/a CassTel Long Distance, by Fair Point Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, in accordance with the Submitted Asset Purchase Agreement, is granted.

ORDER APPROVING TRANSFER OF ASSETS, GRANTING CERTIFICATES OF SERVICE AUTHORITY, AND DESIGNATING FAIRPOINT COMMUNICATIONS AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

On January 23, 2006, Cass County Telephone Company, Limited Partnership; LEC Long Distance, Inc., d/b/a CassTel Long Distance; FairPoint Communications, Inc.; FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications; and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, filed a Joint Application for authority to transfer the assets of the CassTel companies to the FairPoint companies. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, also request that they be granted the certificates of service authority that they will need to provide service to CassTel's customers. Further-

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more, FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, asks that it be designated as an eligible telecommunications carrier for purposes of receiving federal universal service support.

On January 25, the Commission issued an Order Directing Notice and Setting Date for Submission of Intervention Requests. That order directed that notice of the proposed transfer of assets be given to the public in Cass, Bates, and Johnson counties. Additionally, on January 27, the Commission ordered that notice be directed to the public in Henry County. Cass County Telephone Company currently provides local telephone service in those four counties. The Commission ordered that any person wishing to intervene in this case file an application to do so no later than February 14. No applications to intervene were filed.

Staff filed its recommendation regarding the application on April 21. Staff's recommendation and supporting memorandum indicate that Staff has closely examined the proposed transaction. Staff concludes that the proposed transfer of assets is not detrimental to the public interest and recommends that it be approved. In particular, Staff indicates that for regulatory purposes, the assets that FairPoint will acquire will be valued at the net original cost as of the date of acquisition with a corresponding acquisition adjustment to record the assets at fair market values for financial purposes. FairPoint has agreed that any acquisition adjustment will not be included in rate base or the regulatory balances of CassTel, and has further agreed to make no request for rate recovery of any acquisition premium in any future rate proceedings. FairPoint has also agreed to forego the rate recovery of any transaction costs resulting from the acquisition of the CassTel assets.

Staff also recommends that FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, be granted the certificates of service authority they will need to provide basic local and interexchange services in Missouri. Furthermore, Staff recommends that FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, be designated as an eligible telecommunications carrier for the receipt of federal universal service fund support. Finally, Staff recommends that the Commission include twenty specific provisions in its order approving the proposed transaction.

The Applicants have not responded to Staff's recommendation, so the Commission will presume that they accept the provisions recommended by Staff. The Office of the Public Counsel, the other party to this case, has not filed a recommendation, and has not responded to Staff's recommendation. On May 24, the Commission conducted an on-the-record presentation regarding the application in this case, as well as Staff's complaint against CassTel in Case Number TC-2005-0357, and Staff's over-earnings investigation in Case Number IR-2006-0374. At that proceeding, the Applicants and Public Counsel urged the Commission to approve the application as part of the overall resolution of the CassTel problem.

On May 19, ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance filed a motion requesting a variance from Commission Rule 4 CSR 240-33.150(4)(B), which requires that, when a change of carrier results from the sale of a company's assets, the acquiring carrier provide notice to the affected custom-

ers through an insert in the customers bill at least 30 days before the change. Since this transaction is expected to close by July 3, the Applicants will not have time to provide that notice through a bill insert. Instead, they propose to provide the notice by a special mailing to those customers at least 30 days before the closing. In its recommendation, Staff agreed that the provision of notice through a special mailing was appropriate. The Commission will grant the requested variance.

Based on the information provided in the verified application and at the on-the-record presentation, and based upon the recommendation and verified memorandum of Staff, which are admitted into evidence, the Commission finds that the proposed transaction will not be detrimental to the public interest and that the application should be approved.

The Commission finds that the services ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, proposes to offer are competitive and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, shall be classified as a competitive company. The Commission finds that waiving the statutes and Commission rules set out in the ordered paragraph below is reasonable and not detrimental to the public interest.

The Commission reminds FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, that failure to comply with their regulatory obligations may result in the assessment of penalties against them. These regulatory obligations include, but are not limited to, the following:

A) The obligation to file an annual report, as established by Section 392.210, RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of \$100 per day for each day that the violation continues. 4 CSR 240-3.540 requires telecommunications utilities to file their annual report on or before April 15 of each year.

B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000.

C) The obligation to comply with all relevant laws and regulations, as well as orders issued by the Commission. If the utility fails to comply, it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.

D) The obligation to keep the Commission informed of their current address and telephone number.

Furthermore, FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, are reminded that, as corporations, non-attorneys may not represent them before the Commission. Instead, a corporation must be represented by an attorney licensed to practice law in Missouri.

In addition, FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, are reminded that Section 392.410.5, RSMo Supp. 2005, renders their certificates of service authority null and void one year from the date of this order unless they have exercised their authority under that certificate.

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IT IS ORDERED THAT:

1. The Joint Application for approval of the transfer and acquisition of the Missouri facilities and systems of Cass County Telephone Company, L.P., and LEC Long Distance, Inc., d/b/a CassTel Long Distance, by FairPoint Communications, Inc., FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, in accordance with the submitted Asset Purchase Agreement, is granted.

2. The Certificate of Service Authority granted to Cass County Telephone Company, L.P., in Case No. TM-95-163 is canceled, effective upon closing of the approved transaction.

3. The Certificates of Service Authority granted to LEC Long Distance, Inc., d/b/a CassTel Long Distance, in Case Nos. TA-99-182 and TA-99-330, are canceled, effective upon closing of the approved transaction.

4. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is granted a certificate of service authority to provide local telecommunications service, including basic local telecommunications service, in the exchanges currently served by Cass County Telephone Company, L.P.

5. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, shall, upon closing of the approved transaction, file tariffs to adopt the following tariffs of Cass County Telephone Company, L.P.:

PSC Mo No. 1, Local Exchange;
PSC Mo No. 2, Access Services;
PSC Mo No. 3, Long Distance;
PSC Mo No. 4, WATTs;
PSC Mo No. 5, Private Line;
PSC Mo No. 6, Digital Services; and
PSC Mo No. 7, Wireless Termination.

6. A) ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, is granted a certificate of service authority to provide intrastate interexchange telecommunications services to the public in the State of Missouri.

B) ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, is classified as a competitive telecommunications company. Application of the following statutes and regulatory rules shall be waived:

Statutes

392.210.2 - Uniform system of accounts
392.240.1 - just and reasonable rates
392.270 - property valuation
392.280 - depreciation rates
392.290 - issuance of stocks and bonds
392.300.2 - transfer of capital stock
392.310 - issuance of stocks and bonds
392.320 - stock dividend payment
392.330 - issuance of stocks and bonds
392.340 - reorganization

Commission Rules

4 CSR 240-10.020 - depreciation fund income

4 CSR 240-30.040 - uniform system of accounts

7. ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, shall, upon closing of the approved transaction, file a tariff to adopt PSC Mo No. 1 of LEC Long Distance, Inc., d/b/a CassTel Long Distance.

8. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is authorized to commence providing local exchange telecommunications service, including basic local telecommunications service, effective upon closing of the approved transaction.

9. ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, is authorized to commence providing interexchange and non-switched local exchange telecommunications service, effective upon closing of the approved transaction.

10. ST Long Distance, Inc., d/b/a FairPoint Communications is granted a variance from Commission Rule 4 CSR 240-33.150(4)(B). The Joint Applicants shall notify all subscribers of the change in carrier through a notice in each subscriber's bill, or by a special mailing, at least 30 days before the change in service.

11. The Joint Applicants are authorized to do and perform, or cause to be done and performed, such other acts and things, as well as make, execute and deliver any and all documents as may be necessary, advisable and proper to the end that the intent and purposes of the approved transaction may be fully effectuated.

12. A) FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is designated as an eligible telecommunications carrier eligible under the provisions of 47 CFR 54.201(d) to receive federal universal service fund support immediately upon the effective date of the close of the sale.

B) Within 60 days of the effective date of this order, the Commission's Staff shall file with the Federal Communications Commission the certification required pursuant to section 54.314(d)(6) of Title 47 of the Code of Federal Regulations.

13. Cass County Telephone Company, L.P., and FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, shall provide Staff with all closing entries to record the purchase and sale of CassTel's telecommunications properties that are the subject of this proceeding within six months of the final closing.

14. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, within six months of the final closing of the approved transaction, shall submit to Staff a revised cost allocation manual that reflects the acquisition of Cass County Telephone Company, L.P. The cost allocation shall be considered Proprietary under the provisions of the protective order in this case.

15. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes. The Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding.

16. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is authorized to use the depreciation rates set forth in Attachment C to Staff's Recommendation.

17. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is directed to inspect the company's facilities for proper bonding and grounding in their normal work activities and immediately correct violations.

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18. In any rate proceeding, FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications' cost of capital shall be based upon its business risk and a reasonable amount of financial risk of its Missouri telephone properties. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications' cost of capital shall not be increased due to unnecessary increased risk because of FairPoint Communications, Inc.'s financial policies.

19. If FairPoint Communications, Inc.'s corporate rating falls below B+, then FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, must within 30 days provide a report to Staff demonstrating that this event was not caused by an increase in FairPoint Communications, Inc.'s financial risk. If FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, cannot demonstrate to Staff's satisfaction that this downgrade was due to factors other than an increase in FairPoint Communications, Inc.'s financial risk, then FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, must within 30 days provide a report to Staff demonstrating that the downgrade will not have a negative impact upon FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications' continued quality of service to its Missouri customers or cause a reduction in its investment in its basic telecommunications services. In the event that FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is unable to demonstrate the aforementioned items to Staff's satisfaction, FairPoint Communications, Inc., shall be required to take the necessary financial action to restore its credit rating within three months, or such other reasonable time if it can demonstrate that three months is unreasonable. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and FairPoint Communications, Inc., shall enter into a contract imposing this obligation upon FairPoint Communications, Inc., and a copy thereof shall be provided to Staff not later than 14 days prior to the closing of the approved transaction.

20. FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, shall provide the Staff's Financial Analysis Department within 30 days of receipt any credit agency report assigning a corporate credit rating to FairPoint Communications, Inc., until such time that FairPoint Communications, Inc., attains an investment grade rating.

21. Any acquisition adjustment and transaction costs that may result from the approved transaction shall not be recovered in rates.

22. So that the Commission may know when the approved transaction is completed and when the certificates of service authority of Cass County Telephone Company, L.P. and LEC Long Distance, Inc., may be canceled, the Commission will direct FairPoint Communications, Inc., to file an appropriate notice in this case upon the closing of the approved transaction.

23. This order shall become effective on June 9, 2006.

Davis, Chm., Murray, Gaw,
Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge

**Staff of the Public Service Commission of the State of Missouri,
Complainant, v. Cass County Telephone Company Limited
Partnership, Respondent.**

Case No. TC-2005-0357

Decided May 30, 2006

Telecommunications §1. The Commission granted Staff the authority to seek penalties in circuit court against CassTel for violations of law by its former President, Kenneth M. Matzdorff. The Commission also said that none of the penalty shall be recovered from CassTel's ratepayers as a result of this order.

ORDER APPROVING STIPULATION AND AGREEMENT

On April 8, 2005, the Staff of the Commission filed a complaint against Cass County Telephone Company Limited Partnership (CassTel). In that complaint, Staff sought authority from the Commission to seek penalties in circuit court against CassTel for violations of law by its former president, Kenneth M. Matzdorff. On December 29, Staff and CassTel filed a stipulation and agreement that would resolve all contested issues related to the complaint. Staff filed suggestions in support of the stipulation and agreement on January 6, 2006.

The Office of the Public Counsel, which is a party to this case, did not join in the stipulation and agreement. However, on December 29, Public Counsel filed a statement indicating that it does not oppose the stipulation and agreement. Commission rule 4 CSR 240-2.115(C) provides that if no party objects to a proposed stipulation and agreement, the Commission may treat a nonunanimous stipulation and agreement as a unanimous stipulation and agreement. Since Public Counsel has indicated that it does not oppose the stipulation and agreement, the Commission will treat it as a unanimous stipulation and agreement.

Staff's complaint against CassTel contains four counts. Count I alleged that Kenneth M. Matzdorff pled guilty to the federal crimes of conspiracy to commit mail fraud and wire fraud. Matzdorff conspired to defraud the Universal Service Administrative Company (USAC) and the National Exchange Carriers Association (NECA) by including, as expenses of CassTel, payments made to Overland Data Center by CassTel that were based on false or fictitious invoices. Those falsified expenses were used to qualify for unwarranted disbursement of subsidies from USAC and revenue distributions from NECA.

Count II of the complaint alleged that by relying on the false or fictitious invoices from Overland Data Center in making entries in the accounts of CassTel, Matzdorff willfully made false entries in the accounts of CassTel in violation of Section 386.560, RSMo 2000. Count III alleged that Matzdorff also violated Commission rule 4 CSR 240-30-040 by making false entries in CassTel's accounts. Finally, Count IV alleged that Matzdorff gave false or misleading testimony to the Commission on April 19, 2004, while under oath.

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In the stipulation and agreement, CassTel admits as follows:

A. CassTel admits that Staff has sufficient documentation and other information which, if duly offered and admitted into evidence at a hearing, would permit a finder of fact to reasonably conclude that Mr. Kenneth M. Matzdorff caused false entries to be made in the books of account of CassTel when he was an officer of CassTel.

B. CassTel admits that Staff has sufficient documentation and other information which, if duly offered and admitted into evidence at a hearing, would permit a finder of fact to reasonably conclude that on April 19, 2004, Mr. Kenneth M. Matzdorff gave false or misleading testimony to the Commission under oath in Case No. IR-2004-0534.

CassTel agrees to make a payment to the Public School Fund in the amount of one million dollars in settlement of the matters alleged in Staff's complaint and in all other potential complaints that might arise out of Staff's investigation into the affairs of CassTel. The settlement, however, specifically excludes any matters associated with Staff's ongoing investigation of, and any current or future complaint, against New Florence Telephone Company, another company associated with Matzdorff and the owners of CassTel. Furthermore, the settlement specifically does not preclude Staff from pursuing an overearnings complaint against CassTel.

In addition, the parties to the stipulation and agreement agree that CassTel has implemented sufficient financial and managerial controls to justify its certification for receipt of federal Universal Service Fund disbursements. Staff agrees to recommend that the Commission certify prospectively to the FCC that funds received by CassTel from the federal high cost support funding mechanisms will be used in accordance with Section 254(e) of the federal Telecommunications Act of 1996. Furthermore, Staff may recommend certification for Universal Service Fund disbursements for prior periods under certain, agreed upon circumstances.

The stipulation and agreement further provides that CassTel will adjust its 2005 books and records in an agreed upon manner to represent an accurate valuation of CassTel's telephone plant in service and depreciation reserve accounts for the period. The parties agree that CassTel will not restate its annual reports to the Commission for the years before 2005. However, CassTel will supplement each annual report for the years 1996 through 2004 with a statement that there are inaccuracies in those reports, with a reference to the 2005 annual report. The 2005 annual report will contain a statement regarding the inaccuracies in the earlier reports.

Finally, the stipulation and agreement indicates that it is predicated on an understanding that the present owners of CassTel will promptly present a sale of CassTel's assets to the Commission for approval. An application for approval of that sale has subsequently been filed with the Commission and is pending in Case Number TM-2006-0306. In that case, FairPoint Communications, Inc., seeks authority to purchase the assets of CassTel and to operate the telecommunica-

tions system currently operated by CassTel. The parties represent that approval of this settlement is needed to facilitate such a sale.

The Commission held an on-the-record presentation regarding the proposed settlement on January 11, 2006. At that proceeding, the Commission questioned the signatory parties about the details of the stipulation and agreement. Although not a party, the Missouri Attorney General, acting on behalf of the State of Missouri, appeared at the on-the-record presentation, and was allowed to express concerns about some aspects of the settlement.

Following the on-the-record presentation, the Attorney General filed a written motion asking that the State of Missouri be allowed to intervene. Staff and CassTel opposed the application to intervene. After considering multiple, extensive, written arguments from the parties, the Commission denied the State of Missouri's application to intervene, but invited the State to file an *amicus curiae* brief by March 1, if it wished to further explain its concerns about the stipulation and agreement. The State has not filed such a brief.

Although the State has elected not to file an *amicus curiae* brief, it did express its concerns at the on-the-record presentation and in the pleadings filed regarding its application to intervene. The Commission will address those concerns before approving the submitted stipulation and agreement.

First, the State contended that the stipulation and agreement lacks language to guarantee that CassTel's ratepayers will not eventually finance the million-dollar penalty, either directly or indirectly. The Commission is satisfied that direct recovery of the penalty through rates will not happen. CassTel is still subject to rate-of-return regulation. Thus, CassTel could recover the penalty directly from its ratepayers only if the Commission allowed the company to include that cost in its rates. While this Commission cannot control the actions of future Commissions, it is highly unlikely that such a recovery would ever be allowed.

The State is also concerned about the possibility that the penalty might be indirectly recovered from CassTel's ratepayers as a result of the sale of the company to new owners. The concern is that the new owners would ultimately pay the amount of the penalty as part of its purchase price for the company. The company's new owners could then seek to base the company's rates on a value for the company that would be inflated by the amount of the penalty.

The State's concern about indirect recovery of the penalty from ratepayers is not well founded. Once again, before the new owners of CassTel could use an inflated purchase price to justify increased rates for its customers, it would need to obtain the approval of this Commission. The Commission has consistently refused to allow regulated utilities to recover a positive acquisition adjustment through rates. Rather, the Commission has held that the cost of service a company is allowed to recover in rates must be based on the original cost of the acquired asset.¹ Under that principle, the price that the new owners pay to purchase CassTel's assets will not affect the rates that the new owners can charge their customers. It is unlikely that a future Commission would depart from this established practice to allow the new owners of CassTel to recover the cost of such a penalty in rates.

¹ Transcript, page 99, lines 9-13.

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Although it is unlikely that the cost of the penalty could ever be recovered from CassTel's ratepayers, CassTel has indicated its willingness to accept language in this order specifically providing that the penalty is not to be recovered from ratepayers. Given that willingness, the Commission will include such language in this order.

The State raised a second concern about the stipulation and agreement regarding the breadth of the enforcement waiver included in the settlement. The stipulation and agreement purports to be a "full and comprehensive settlement" of this complaint, as well as any potential enforcement complaints arising from or related to Staff's investigation of CassTel or Local Exchange Carrier, LLC. The agreement also provides that it:

resolves and settles for all time all pending or unfiled actions for any penalty or forfeiture under or by virtue of the Public Service Commission Law, including those which may be brought by third parties, for or on account of any act, transaction, matter or thing, known or unknown, concerning the subject matter of the Complaint and the Investigation against CassTel, its successors, assigns, partners, agents, managers, officers and employees and, to the extent the Commission has jurisdiction with respect thereto, LEC, its successors, assigns, members, agents, managers, officers and employees and to forever release each and all of them from any punitive adverse action associated with the matters alleged in the Complaint or which have been examined in the context of the Investigation involving CassTel.

The agreement then goes on to specifically exclude settlement of Staff's ongoing investigation of New Florence Telephone Company. In addition, it specifically allows Staff to proceed with an over-earnings complaint against CassTel.²

This is a fairly broad release, and Staff acknowledges that it is intended to cover any penalty actions that the Staff could have brought based on information it learned during the investigation, other than the over-earnings investigation. The State expressed particular concern about the provision of the release that would bar complaints brought by unidentified third parties. However, that provision is of doubtful effect: the agreement of these parties cannot prevent an action by a nonparty. In any event, there is no indication that any third party intends to file a complaint. In the end, the questions about the details of the release are not sufficient to cause the Commission to reject an agreement that will pave the way for the sale of CassTel's system to a company that is capable of providing high quality service to its customers.

The State was also concerned about the provision of the stipulation and agreement that commits the Commission's Staff to support the certification of CassTel for the receipt of federal Universal Service Fund disbursements, both for prospective periods, and for prior periods. CassTel has not received Universal

² Staff's over-earnings complaint against CassTel is currently pending in Case No. IR-2006-0374. CassTel has agreed to refund \$4.1 million to its customers to resolve Staff's over-earnings allegations.

Service funding since October 2004, due to allegations of criminal activity. The concern is that the agreement could result in CassTel once again receiving such funding while it is still owned by criminals.

This concern was greatly reduced by the filing of an agreement to sell the assets of CassTel to a buyer that is in no way associated with the criminal activities of the current owners of CassTel. Any future Universal Service funding will go to the buyer, not to CassTel's current owners. Of course, the proposed sale of CassTel's assets has not yet been finalized. Nevertheless, even if that sale never occurs and CassTel's current owners continue to own the company, the stipulation and agreement merely provides that Staff will recommend prospective certification for future periods and may recommend certification for prior periods. The agreement does not require the Commission to accept such a recommendation. Therefore, under any circumstance, the Commission retains its authority to prevent any improper disbursement of Universal Service funding.

The resolution of this case is closely tied to two other cases, TM-2006-0306, in which FairPoint Communications seeks authority to purchase and operate CassTel's telecommunications system assets, and IR-2006-0374, in which CassTel has agreed to refund \$4.1 million to its customers to resolve Staff's over-earnings concerns. The parties have described these three cases as the three legs of a tripod upon which the entire resolution of the CassTel problem must rest. All three cases must be resolved if the problem is to be solved. In order to consider the resolution of the entire problem, the Commission conducted an additional on-the-record presentation on May 24.

After reviewing the stipulation and agreement and after considering the related cases, the Commission finds that the stipulation and agreement should be approved as a resolution of Staff's complaint, and as a necessary part of the overall resolution of the CassTel problem.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on December 29, 2005, is approved, and the signatory parties are ordered to comply with its terms.
2. None of the financial penalty imposed on Cass County Telephone Company Limited Partnership by terms of this order and the Stipulation and Agreement shall ever be recovered from the ratepayers of the company.
3. This order shall become effective on June 9, 2006.

Davis, Chm., Murray, Gaw,
Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Investigation into the Earnings of Cass
County Telephone Company.**

*Case No. IR-2006-0374
Decided May 30, 2006*

Telecommunications §16. Staff determined that CassTel was earning excess revenues. To rectify that situation, the parties agreed CassTel would pay \$3.6 million to its qualifying customers, partly as a credit on bills and partly as a cash payment.

**ORDER APPROVING STIPULATION AND AGREEMENT AND FIRST
AMENDED STIPULATION AND AGREEMENT**

On March 30, 2006, the Staff of the Commission, Cass County Telephone Company, Limited Partnership (CassTel), Local Exchange Company, LLC (LEC), FairPoint Communications, Inc., FairPoint Communications Missouri, Inc., and the Office of the Public Counsel filed a Stipulation and Agreement. The Stipulation and Agreement resolves Staff's investigation into over earnings by CassTel. A copy of the Stipulation and Agreement is attached to this order as Attachment 1.

The Commission directed that notice of the Stipulation and Agreement be provided to other phone companies and to the public in the area served by CassTel. The Commission also established an intervention deadline of April 24. On April 24, AT&T Missouri filed a timely application to intervene and indicated its opposition to the Stipulation and Agreement. No other applications to intervene were submitted.

After engaging in further negotiations, the parties, now including AT&T Missouri, filed a First Amended Stipulation and Agreement on May 22. A copy of the First Amended Stipulation and Agreement is attached to this order as Attachment 2. Staff filed suggestions in support of the stipulations on May 22, and the Commission conducted an on-the-record presentation regarding the stipulations on May 24.

The stipulations in this case are closely related to two other cases pending before the Commission. All three cases relate to financial misdeeds at CassTel over the past several years. Staff brought a complaint against CassTel in Case Number TC-2005-0357 and CassTel has agreed to pay an administrative penalty of \$1 million to resolve that complaint. CassTel has also agreed to sell its assets to FairPoint Communications, and approval of that transaction is pending in Case Number TM-2006-0306.

In this case, Staff investigated CassTel to determine whether that company was earning excess revenues. Staff established a test year ending December 31, 2004, trued-up through the first six months of 2005. After extensive negotiations with CassTel and Public Counsel, the parties agreed that CassTel was over earning. To rectify that situation, the parties agreed that CassTel would pay \$3.6 million to its qualifying customers, partly as a credit on bills and partly as a cash payment. Qualifying customers are customers who have been paying tariffed rates for

services from CassTel continuously since January 1, 2005. Any funds that cannot be distributed to qualifying customers will be given to the West Central Missouri Community Action Agency for use in funding that agency's low-income housing energy assistance program. The funds to be used to provide the payments will be withheld from the proceeds from the sale of CassTel's assets to FairPoint Communications.

The Amended Stipulation and Agreement requires an additional cash distribution totaling \$500,000 to be paid to other telecommunications carriers that have paid for switched access telecommunications services from CassTel for the period of January 1, 2005, through April 30, 2006. The payments are based on the percentage of switched access payments made by those carriers during that period. After including the additional \$500,000 payments required by the Amended Stipulation and Agreement, CassTel will pay a total of \$4.1 million to its customers.

In return for the payments, the parties to the stipulations agree that they will not file a general rate increase case, or aid in the filing of a rate complaint case concerning the rates of CassTel or FairPoint Missouri during the two years (730 days) following the effective date of this order. The stipulations provide that the rate moratorium can be avoided if a significant, unusual event has a major impact on CassTel or FairPoint. CassTel and FairPoint also agree that they will not seek competitive or price-cap regulated status until after the next rate case, meaning after the expiration of the rate moratorium.

In addition, the stipulation and agreement provides that the Commission will issue three specified accounting authority orders regarding the amortization of the payments.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.² Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Stipulation and Agreement and the First Amended Stipulation and Agreement.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on March 30, 2006, and the First Amended Stipulation and Agreement filed on May 22, 2006, are approved as a resolution of all issues in this case (See Attachment 1).
2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement and the First Amended Stipulation and Agreement.

¹Section 536.060, RSMo Supp. 2005.

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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3. FairPoint Communications Missouri, Inc., is authorized to amortize, based on the actual days of the month, as a reduction of booked local revenues, and as more specifically set forth in Appendix A to the Amended Stipulation and Agreement, \$4.1 million – the sum total of the credits and cash distributions set forth in paragraph II of the Stipulation and Agreement – during the post-Closing Date moratorium set forth in paragraph IV of the Stipulation and Agreement.

4. Cass County Telephone Company, Limited Partnership, is authorized to amortize, based on the actual days of the month, as a reduction of booked local revenues, \$350,000 (i.e. the amount of the paragraph II.A., customer credit), for a period of one year commencing on the Effective Date, if the Closing Date is not within forty-five days after the Effective Date.

5. FairPoint Communications Missouri, Inc. is authorized to amortize, based on the actual days of the month, \$350,000 in accordance with the previous paragraph, if the Closing Date is after Cass County Telephone Company, Limited Partnership begins amortizing \$350,000 as a reduction of booked local revenues.

6. This order shall become effective on June 9, 2006.

Davis, Chm., Murray, Gaw,
Clayton and Appling, CC., concur

Woodruff, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of a Management Audit of Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P.

*Case No. EO-2006-0356
Decided June 13, 2006*

Electric §42. The Commission ordered the Staff of the Commission to conduct a management audit of Aquila to evaluate the quality of Aquila's managements.

**ORDER REQUIRING A MANAGEMENT AUDIT OF AQUILA, INC. AND
SPECIFYING THE ISSUES TO BE ADDRESSED**

On March 16, 2006, the Office of the Public Counsel filed a motion expressing its concern that Aquila, Inc., is being mismanaged to the detriment of its ratepayers. Public Counsel asked the Commission to conduct a management audit of Aquila to evaluate the quality of Aquila's management. After receiving responses from its Staff and from Aquila, the Commission scheduled a conference to take place on May 15. The Commission directed the participants in the conference to discuss the need for a formal management audit, as well as the purpose of such an audit, and the means by which an audit would be conducted.

After participating in the conference, Staff, Public Counsel, and Aquila filed a report on May 30. The joint report indicates that the parties have agreed upon the scope of Staff's audit, as well as a time frame for the completion of Staff's investigation. The parties have agreed that Staff's investigation will examine the impacts on Missouri consumers of Aquila's past decisions regarding 1) incentive compensation; 2) executive compensation; 3) employee bonus payments; 4) pension and other post-employee benefits funding controls; 5) the South Harper generating facility; and 6) the Staff will complete its ongoing investigation of allegations that an individual has made regarding particular activities at Aquila. Staff estimates that it will complete a draft report regarding the results of its investigation by September 15, 2006. Thereafter, Public Counsel and Aquila will be given an opportunity to comment on that draft, and Staff anticipates filing its final report in this case by October 31, 2006.

The Commission will accept the recommendations of the parties, but it will also direct Staff to investigate several additional issues. The additional issues are as follows:

- 7) decisions that Aquila has made to invest in unregulated activities;
- 8) decisions that Aquila has made related to efforts to protect its regulated activities from the company's involvement in unregulated activities;
- 9) decisions that Aquila has made that involve activity that was illegal, inappropriate, or improper under State or Federal statutes or regulations.
- 10) decisions that Aquila has made regarding the Aries facility.

Staff shall determine the timeframe to be investigated relative to each issue. Staff shall also, as part of its report, indicate the extent to which the results of its investigation can be used in any future rate case brought by Aquila.

The procedures that the parties have proposed for the conduct and reporting of the results of Staff's investigation are reasonable and the Commission will accept them.

IT IS ORDERED THAT:

1. The Staff of the Commission, the Office of the Public Counsel, and Aquila, Inc., shall proceed with the investigation of Aquila, Inc., in the manner described in their report filed on May 30, 2006, with the inclusion of the additional issues identified in this order.
2. This order shall become effective on June 13, 2006.

Davis, Chm., Gaw, and Clayton, CC., concur
Murray and Appling, CC., dissent

Woodruff, Deputy Chief Regulatory Law Judge

In the Matter of the Application of The Empire District Electric Company for Authority to Transfer Functional Control of Certain Transmission Assets to the Southwest Power Pool, Inc.*

Case No. EO-2006-0141

Decided June 13, 2006

Electric §4. The Empire District Electric Company is authorized to transfer to the Southwest Power Pool, Inc. control of certain transmission assets.

ORDER APPROVING STIPULATION AND AGREEMENT

Background

On September 28, 2005, The Empire District Electric Company (EDE) filed an application under Section 393.190.1, RSMo 2000, and Commission rule 4 CSR 240-3.110 to transfer functional control of certain transmission assets to the Southwest Power Pool, Inc. As required by Section 393.190.1, the Commission issued an Order Directing Notice of Tax Impact, wherein the Commission informed the County Clerks of Barry, Barton, Cedar, Christian, Dade, Dallas, Green, Hickory, Jasper, Lawrence, McDonald, Newton, Polk, St. Clair, Stone and Taney Counties that the proposed transaction will have no tax impact on the revenues of their respective counties. The Commission subsequently set an intervention deadline and ordered that notice be properly given. The Commission granted intervention to Southwest Power Pool, Inc., Aquila, Inc. – Investor (Electric), Midwest Independent Transmission System Operator (MISO) and the Kansas City Power & Light Company.

On February 24, 2006, the parties filed a Stipulation and Agreement. The signatories include: EDE; Southwest Power Pool; Kansas City Power & Light; the Staff of the Commission; and the Office of the Public Counsel. Although not signatories to the Agreement, Aquila filed a Notice of No Opposition and MISO filed a Waiver of Right to Hearing. No party has filed opposition to the agreement. The Staff of the Commission filed its Memorandum in Support of the Stipulation and Agreement on March 14, 2006. Thereafter, the Commission held an on-the-record presentation to better understand certain circumstances surrounding Empire's participation in the SPP.

The Agreement

The signatories to the Stipulation and Agreement agreed on the following:

- EDE's interim and conditional participation in the SPP
- transmission service to the Missouri Bundled Retail Load – the terms and conditions of which are contained in the "Service Agreement", Attachment A, to the Stipulation and Agreement.
- SPP administrative costs
- SPP geographic scope and function

* See page 534 for another order in this case.

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- joint operating agreements addressing an intrastate RTO seam
- sunset provision and effective date

The signatories agree that EDE's interim and conditional participation in the SPP is "prudent and reasonable" and is "not detrimental to the public interest."

Staff's Memorandum in Support

In its Memorandum, Staff points out that the standard for approval of this type of application is that the transfer is not detrimental to the public interest. In addition to being measured in terms of dollars, this standard should also take into consideration the following:

- reliability of the interconnected power system
- public safety
- improvements or detriments to system planning
- impact on the jurisdiction of the Missouri Commission

Staff goes on to discuss each of these considerations in great detail.

Monetary cost/benefit

With regard to a "dollar" cost/benefit analysis, Staff considers two elements: 1) the costs paid by EDE to SPP for its administration of the RTO; and 2) the savings related to more efficient use of existing generation and transmission assets. Staff informs the Commission that the SPP contracted with Charles River Associates, International to conduct a study of the cost and benefits of the entire SPP region. That study concluded that the SPP, as an RTO, is cost beneficial for EDE. Further, the study shows a strong indication that the net benefits to Missouri ratepayers from EDE joining the SPP are positive. Staff does, however, point out that any lack of accuracy of the study may primarily have to do with the relative costs of fuels, concluding that higher gas costs lead to an increase in benefit but that higher coal prices would result in lower benefits.

Although the studies were the best information available at the time they were performed, Staff adds that it supports the Commission granting interim approval of EDE's participation in the SPP. Further, the Stipulation and Agreement require an Interim Report that measures the benefits of participation. The Interim Report reviews the actual costs of participation compared to an estimate of what the costs would have been absent such participation. Additionally, if the cost of administration increases by more than 25% or participation in the market goes down by more than 25%, EDE will file a pleading with the Commission to address the merits of continued participation. Finally, with regard to transmission upgrades, if any one supplemental upgrade project exceeds \$25 million, EDE agrees to provide Staff and the OPC with a report detailing the need, costs and anticipated benefits of the upgrade.

Reliability

Staff states that reliability will be improved simply because transmission service will be provided on an integrated regional basis in which all of the physical flows are accurately taken into account. Information is faster and more accurate than if processed by a single Regional Transmission Provider. Also, with the additional flexibility of the RTO to dispatch generation, the RTO is better able to manage congestion and thereby improve the reliability of the system.

Public Safety

EDE will remain responsible to ensure that its bulk power systems do not threaten public safety. However, removing the responsibilities to also manage the provision of transmission service should allow EDE to better focus on public safety issues.

System Planning

A primary benefit of regional planning is that reliable transmission service can be provided on a region-wide basis at a lower cost. One specific aspect of planning has to do with system upgrades. Although the SPP is allowed by FERC to require regional cost sharing for Base-Plan Projects, those projects must be needed in order to fix reliability issues. The Interim Report to be filed by EDE also addresses the issue of system upgrades.

Commission Jurisdiction

The Service Agreement, attached to the Stipulation and Agreement, retains ratemaking authority of the Commission. The agreement prevents the transfer of transmission ratemaking for EDE to FERC-determined SPP rates. The Service Agreement, however, must be approved by FERC. If changes are required and the signatories can agree on those changes, the revised Service Agreement will be provided to the Commission's Staff and OPC. Within 90 days thereafter, any signatory can file with the Commission a pleading stating whether the Commission should rescind or maintain its approval of EDE's participation in the SPP.

Staff concludes that the parties have crafted a Stipulation and Agreement that accommodates EDE's request, while protecting the public interest.

On-the-Record Presentation

The Commission held an on-the-record presentation on May 12, 2006. The Commissioners and the parties discussed issues having to do with the interests of both the company's customers and the general public. With regard to "requirements" customers, the contracts under which those customers are operating would not be disturbed during the duration of the contract. Additionally, the Commission was assured that after the transfer the Commission, not the FERC, would continue to have jurisdiction over the retail rates of the company.

The Commission also discussed with the parties the consequences that would result from the company withdrawing from the SPP. Witnesses explained that the company would have to pay an exit fee that Staff deemed reasonable and further, that the company would have to honor its obligations with regard to new transmission expansions.

Finally, as there are two regional "power pools" in Missouri, SPP and MISO, the Commission solicited input on potential issues that may arise. The Commission was informed that these two entities can operate efficiently and in the public interest through "seams agreements." These agreements are necessary to address issues having to do with power flow and reliability.

Conclusion

The Commission has reviewed EDE's application, the resulting Stipulation and Agreement, and Staff's memorandum in support of the Stipulation and Agreement and, having considered these verified pleadings, which are admitted

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into evidence, finds that the proposed transfer of EDE's assets to the SPP is not detrimental to the public interest and shall be approved. Furthermore, no party objects to the Stipulation and Agreement. Therefore, under Commission rule 4 CSR 240-2.115(2)(C), the Commission will treat it as unanimous.

The Commission points out that the parties have agreed that Empire's participation with the SPP is for a duration of up to seven years. Further, that two years prior to the conclusion of the Interim Period, Empire has agreed to file a pleading with the Missouri Public Service Commission regarding Empire's continued participation. Also the parties have acknowledged and agreed that, prior to the end of the Interim Period, the Missouri Public Service Commission has the jurisdiction to terminate, modify or further condition Empire's participation with the SPP. It is with this understanding that the Commission approves the Stipulation and Agreement.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed by the signatories in this matter is approved.
2. The Empire District Electric Company is authorized to transfer to the Southwest Power Pool, Inc., conditional and interim functional control of certain transmission assets as identified in Appendix C attached to EDE's application.
3. The Empire District Electric Company and the Southwest Power Pool, Inc., shall comply with the terms and conditions contained in the Stipulation and Agreement.
4. The Empire District Electric Company and the Southwest Power Pool, Inc. are authorized to comply with the Stipulation and Agreement and the attached Service Agreement.
5. The Empire District Electric Company and the Southwest Power Pool, Inc. are authorized to enter into, execute and perform in accordance with the terms of all other documents, not inconsistent with the Stipulation and Agreement, which may be reasonable necessary and incidental to the performance of the transaction.
6. During The Empire District Electric Company's transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri Public Service Commission's jurisdiction as specifically described in the Stipulation and Agreement and generally described in the body of this order.
7. This order shall become effective on June 23, 2006.
8. This case may be closed on June 24, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Application of Kansas City Power & Light
Company for Authority to Transfer Functional Control of
Certain Transmission Assets to the Southwest Power Pool,
Inc.***

Case No. EO-2006-0142

Decided June 13, 2006

Electric §4. Kansas City Power and Light Company is authorized to transfer conditional and interim functional control of certain transmission assets to the Southwest Power Pool, Inc. During KCPL's transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri PSC's jurisdiction as specifically described in the Stipulation and Agreement.

ORDER APPROVING STIPULATION AND AGREEMENT

Background

On September 28, 2005, Kansas City Power & Light Company filed an application under Section 393.190.1, RSMo 2000, and Commission rule 4 CSR 240-3.110 to transfer functional control of certain transmission assets to the Southwest Power Pool, Inc. As required by Section 393.190.1, the Commission issued an Order Directing Notice of Tax Impact, wherein the Commission informed the County Clerks of Cass, Jackson, Lafayette, Carroll, Chariton and Saline Counties that the proposed transaction will have no tax impact on the revenues of their respective counties. The Commission subsequently set an intervention deadline and ordered that notice be properly given. The Commission granted intervention to Southwest Power Pool, Inc., Aquila, Inc. – Investor (Electric), Midwest Independent Transmission System Operator (MISO) and The Empire District Electric Company.

On February 24, 2006, the parties filed a Stipulation and Agreement. The signatories include: KCPL; Southwest Power Pool; Empire District Electric; the Staff of the Commission; and the Office of the Public Counsel. Although not signatories to the Agreement, Aquila filed a Notice of No Opposition and MISO filed a Waiver of Right to Hearing. No party has filed opposition to the agreement. The Staff of the Commission filed its Memorandum in Support of the Stipulation and Agreement on March 14, 2006. Thereafter, the Commission held an on-the-record presentation to better understand certain circumstances surrounding KCPL's participation in the SPP.

The Agreement

The signatories to the Stipulation and Agreement agreed on the following:

- KCPL's interim and conditional participation in the SPP
- transmission service to the Missouri Bundled Retail Load – the terms and conditions of which are contained in the "Service Agreement", Attachment A, to the Stipulation and Agreement.
- SPP administrative costs
- SPP geographic scope and function

* See page 530 for another order in this case

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- joint operating agreements addressing an intrastate RTO seam
- sunset provision and effective date

The signatories agree that KCPL's participation in the SPP is "prudent and reasonable" and is "not detrimental to the public interest."

Staff's Memorandum in Support

In its Memorandum, Staff points out that the standard for approval of this type of application is that the transfer is not detrimental to the public interest. In addition to being measured in terms of dollars, this standard should also take into consideration the following:

- reliability of the interconnected power system
- public safety
- improvements or detriments to system planning
- impact on the jurisdiction of the Missouri Commission

Staff goes on to discuss each of these considerations in great detail.

Monetary Cost/benefit

With regard to a "dollar" cost/benefit analysis, Staff considers two elements: 1) the costs paid by KCPL to SPP for its administration of the RTO; and 2) the savings related to more efficient use of existing generation and transmission assets. Staff informs the Commission that the SPP contracted with Charles River Associates, International to conduct a study of the cost and benefits of the entire SPP region. That study concluded that the SPP, as an RTO, is cost beneficial for KCPL. Further, the study shows a strong indication that the net benefits to Missouri ratepayers from KCPL joining the SPP are positive. Staff does, however, point out that any lack of accuracy of the study may primarily have to do with the relative costs of fuels, concluding that higher gas costs lead to an increase in benefit but that higher coal prices would result in lower benefits.

Although the studies were the best information available at the time they were performed, Staff adds that it supports the Commission granting interim approval of KCPL's participation in the SPP. Further, the Stipulation and Agreement require an Interim Report that measures the benefits of participation. The Interim Report reviews the actual costs of participation compared to an estimate of what the costs would have been absent such participation. Additionally, if the cost of administration increases by more than 25% or participation in the market goes down by more than 25%, KCPL will file a pleading with the Commission to address the merits of continued participation. Finally, with regard to transmission upgrades, if any one supplemental upgrade project exceeds \$25 million, KCPL agrees to provide Staff and the OPC with a report detailing the need, costs and anticipated benefits of the upgrade.

Reliability

Staff states that reliability will be improved simply because transmission service will be provided on an integrated regional basis in which all of the physical flows are accurately taken into account. Information is faster and more accurate than if processed by a single Regional Transmission Provider. Also, with the additional flexibility of the RTO to dispatch generation, the RTO is better able to manage congestion and thereby improve the reliability of the system.

Public Safety

KCPL will remain responsible to ensure that its bulk power systems do not threaten public safety. However, removing the responsibilities to also manage the provision of transmission service should allow KCPL to better focus on public safety issues.

System Planning

A primary benefit of regional planning is that reliable transmission service can be provided on a region-wide basis at a lower cost. One specific aspect of planning has to do with system upgrades. Although the SPP is allowed by FERC to require regional cost sharing for Base-Plan Projects, those projects must be needed in order to fix reliability issues. The Interim Report to be filed by KCPL also addresses the issue of system upgrades.

Commission Jurisdiction

The Service Agreement, attached to the Stipulation and Agreement, retains ratemaking authority of the Commission. The agreement prevents the transfer of transmission ratemaking for KCPL to FERC-determined SPP rates. The Service Agreement, however, must be approved by FERC. If changes are required and the signatories can agree on those changes, the revised Service Agreement will be provided to the Commission's Staff and OPC. Within 90 days thereafter, any signatory can file with the Commission a pleading stating whether the Commission should rescind or maintain its approval of KCPL's participation in the SPP.

Staff concludes that the parties have crafted a Stipulation and Agreement that accommodates KCPL's request, while protecting the public interest.

On-the-Record Presentation

The Commission held an on-the-record presentation on May 12, 2006. The Commissioners and the parties discussed issues having to do with the interests of both the company's customers and the general public. With regard to "requirements" customers, the contracts under which those customers are operating would not be disturbed during the duration of the contract. Additionally, the Commission was assured that after the transfer the Commission, not the FERC, would continue to have jurisdiction over the retail rates of the company.

The Commission also discussed with the parties the consequences that would result from the company withdrawing from the SPP. Witnesses explained that the company would have to pay an exit fee that Staff deemed reasonable and further, that the company would have to honor its obligations with regard to new transmission expansions.

Finally, as there are two regional "power pools" in Missouri, SPP and MISO, the Commission solicited input on potential issues that may arise. The Commission was informed that these two entities can operate efficiently and in the public interest through "seams agreements." These agreements are necessary to address issues having to do with power flow and reliability.

Conclusion

The Commission has reviewed KCPL's application, the resulting Stipulation and Agreement and Staff's memorandum in support of the Stipulation and

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Agreement and having considered these verified pleadings, which are admitted into evidence, finds that the proposed transfer of KCPL's assets to the SPP is not detrimental to the public interest and shall be approved. Furthermore, no party objects to the Stipulation and Agreement. Therefore, under Commission rule 4 CSR 240-2.115(2)(C), the Commission will treat it as unanimous.

The Commission points out that the parties have agreed that KCPL's participation with the SPP is for a duration of up to seven years. Further, that two years prior to the conclusion of the Interim Period, KCPL has agreed to file a pleading with the Missouri Public Service Commission regarding KCPL's continued participation. Also, the parties have acknowledged and agreed that, prior to the end of the Interim Period, the Missouri Public Service Commission has the jurisdiction to terminate, modify or further condition KCPL's participation with the SPP. It is with this understanding that the Commission approves the Stipulation and Agreement.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed by the signatories in this matter is approved.
2. Kansas City Power & Light Company is authorized to transfer to the Southwest Power Pool, Inc., conditional and interim functional control of certain transmission assets as identified in Appendix C attached to KCPL's application.
3. Kansas City Power & Light Company and the Southwest Power Pool, Inc., shall comply with the terms and conditions contained in the Stipulation and Agreement.
4. Kansas City Power & Light Company and the Southwest Power Pool, Inc. are authorized to comply with the Stipulation and Agreement and the attached Service Agreement.
5. Kansas City Power & Light Company and the Southwest Power Pool, Inc. are authorized to enter into, execute and perform in accordance with the terms of all other documents, not inconsistent with the Stipulation and Agreement, which may be reasonably necessary and incidental to the performance of the transaction.
6. During Kansas City Power & Light Company's transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri Public Service Commission's jurisdiction as specifically described in the Stipulation and Agreement and generally described in the body of this order.
7. This order shall become effective on June 23, 2006.
8. This case may be closed on June 24, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**FullTel, Inc., Complainant, v. CenturyTel of Missouri, LLC,
Respondent.**

*Case No. TC-2006-0068
Decided June 15, 2006*

Telecommunications §46. The Commission held that CenturyTel shall honor the interconnection agreement that it has with FullTel Inc. by taking whatever steps are necessary to actually interconnect and exchange traffic with FullTel because CenturyTel's only reason for denying interconnection no longer exists.

Appearances

Mark W. Comley, Newman, Comley & Ruth P.C., 600 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102, for Complainant FullTel, Inc.

Andrew M. Klein, Klein Law Group, PLLC, 1200 19th Street, NW, Suite 200, Washington DC 20836, for Complainant FullTel, Inc.

Larry W. Dority, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Respondent CenturyTel of Missouri, LLC

Calvin K. Simshaw, VP-Associate General Counsel-Regulatory, CenturyTel, 805 Broadway, Vancouver, Washington 98660, for Respondent CenturyTel of Missouri, LLC.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kennard L. Jones, Judge

REPORT AND ORDER

Procedural History

On August 8, 2005, FullTel, Inc. filed a complaint with the Missouri Public Service Commission against CenturyTel of Missouri, LLC, for enforcement of an interconnection agreement between the two companies. After numerous pleadings, including a Joint Stipulation of Facts, Legal Briefs, and responses to orders directing filing, the Commission held an evidentiary hearing on March 10, 2006. Since that time, the parties have each filed a list of authorities in support of their positions, with CenturyTel filing an addendum to that list on April 20.

Discussion

FullTel and CenturyTel have entered into an interconnection agreement that has been approved by this Commission. CenturyTel, however, refused to implement the agreement because FullTel intended to send only ISP bound traffic over

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the proposed interconnection facility. However, over the course of these proceedings, FullTel has lost its sole customer, an internet service provider. It is therefore irrelevant that FullTel once intended to transmit internet traffic through its interconnection agreement with CenturyTel.

It is conceivable that a competitive local exchange company would enter into an interconnection agreement prior to having any customers. In fact, this may be preferred because service may be delayed if interconnection is not already in place. This being said, FullTel is now in the same position of many CLECs that have entered into interconnection agreements. CenturyTel is therefore obligated to honor its interconnection agreement with FullTel and will be directed to take whatever steps are necessary to do so.

Findings of Fact

1. Complainant is FullTel, Inc., an Oklahoma corporation authorized by the Commission to provide telecommunications service to the public in the State of Missouri.¹
2. Respondent is CenturyTel of Missouri, LLC, a Louisiana limited liability company providing telecommunications services in the State of Missouri regulated by the Missouri Public Service Commission.
3. FullTel and CenturyTel have entered into an interconnection agreement approved by the Missouri Commission.²
4. CenturyTel refused to allow FullTel to interconnect because CenturyTel objected to the nature of the traffic FullTel intends to provide.³
5. FullTel's provision of ISP bound traffic was at the request of one Missouri internet service provider.⁴
6. FullTel's only customer, the ISP provider, has terminated its contract with FullTel and FullTel has returned the company's deposit.⁵
7. Although FullTel's has lost its only customer, FullTel still seeks to interconnect with CenturyTel under the terms of the interconnection agreement without a specific FullTel customer in mind.⁶
8. Under such interconnection, FullTel's single point of interconnection with CenturyTel shall be in Branson, Missouri.⁷
9. FullTel expects to operate as a local exchange carrier in Ava, Mansfield, Willow Springs and Gainesville.⁸

¹ Tr. p. 104, lines 5-16; p. 105, line 6.

² Tr. p. 84, line 8.

³ Tr. p. 133, lines 11-15; Tr. p. 147, lines 6-19; Tr. p. 186; Tr. p. 188.

⁴ Tr. p. 63, lines 15-19.

⁵ Tr. 64, lines 11-12.

⁶ Tr. p. 125, lines 5-14.

⁷ Tr. p. 61, lines 11-15.

⁸ Tr. p. 107, line 3-4.

Conclusions of Law**Obligations under the Telecommunications Act**

CenturyTel has an obligation to interconnect with the facilities and equipment of FullTel.⁹ CenturyTel further has “[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network.”¹⁰ Other than objecting to the nature of the traffic FullTel intended to transmit, CenturyTel has offered no reason for refusing to allow FullTel to interconnect. FullTel no longer has the one customer whose traffic FullTel intended to transmit as its first customer. Therefore, CenturyTel’s only reason for denying interconnection no longer exists. The Commission will therefore direct CenturyTel to take whatever steps are necessary to effect its interconnection with FullTel such that traffic may be exchanged if and when FullTel acquires a customer in the exchanges served by that interconnection. The Commission will further order FullTel to file a notice when such interconnection is complete. Upon such notice, the Commission will close this matter.

IT IS ORDERED THAT:

1. CenturyTel of Missouri, LLC shall honor the interconnection agreement it has with FullTel, Inc., by taking whatever steps are necessary to actually interconnect and exchange traffic with FullTel.
2. FullTel Inc. shall, upon CenturyTel of Missouri, LLC complying with the Commission’s order in ordered paragraph 1, file a notice informing the Commission of such.
3. This order shall become effective on June 25, 2006.

Davis, Chm., Murray, and Gaw, CC., concur.
Clayton and Appling, CC., dissent.

⁹ 47 U.S.C §251 (a)(1).

¹⁰ 47 U.S.C §251 (c)(2).

**In the Matter of The Empire District Electric Company of Joplin,
Missouri for Authority to File Tariffs Increasing Rates for
Electric Service Provided to Customers in the Missouri
Service Area of the Company.***

*Case No. ER-2006-0315
Decided June 15, 2006*

Electric §49. The Commission considered and rejected specified tariff sheets and testimony due to Empire's failure to comply with the Commission's Order Clarifying Continued Applicability of the Interim Energy which was voluntarily negotiated in Case No. ER-2004-0570 between Empire, Praxair, Inc., Explorer Pipeline, Inc. and the Office of Public Counsel and subsequently memorialized in a Stipulation and Agreement.

ORDER REJECTING TARIFFS AND STRIKING TESTIMONY

On May 2, 2006, in response to a Motion for Clarification filed by The Empire District Electric Company ("Empire"), the Missouri Public Service Commission issued its Order Clarifying Continued Applicability of the Interim Energy Charge ("Order"). In its Order, the Commission addressed the continued applicability of the Interim Energy Charge ("IEC") voluntarily negotiated in Case No. ER-2004-0570 between Empire, Praxair, Inc., Explorer Pipeline, Inc. and the Office of the Public Counsel and subsequently memorialized in a Stipulation and Agreement.

The Commission's May 2, 2006 Order required Empire to remove "from its pleadings and other filings in this case the request it consented not to make."¹ Empire did not ask for rehearing of the Commission's Order, but has not complied with the Commission's Order. Empire's failure to comply with the Commission's Order necessitates removal by striking testimony and rejecting tariffs.

On May 26, 2006, Praxair Inc. and Explorer Pipeline, Inc. ("Praxair"), filed a Motion to Reject Specified Tariff Sheets and Strike Testimony. On June 1, 2006, Empire filed its Response to Motion to Reject and Strike. In its response, Empire agreed that P.S.C. Mo. No. 5, Section 4, 2nd Revised Sheet No. 21; P.S.C. Mo. No. 5, Section 4, Original Sheet No. 22; and P.S.C. Mo. No. 5, Section 4, Revised Sheet No. 23, should be rejected.

In addition, as requested by Praxair, the following shall be rejected, stricken or retained as follows:

- P.S.C. Mo. No. 5, Section 4, 5th Revised Sheet No. 17 (this blank sheet is retained);
- The entirety of the Direct Testimony of Todd W. Tarter will not be stricken, rather, the following specific language will be stricken:
 - Page 2, lines 4 through 7 (to the period);
 - Page 2, lines 16 through 24;
 - Page 3, lines 1 through 12;

* See pages 344 and 592 for other orders in this case.

¹ Order Clarifying Continued Applicability of the Interim Energy Charge at page 3.

- Page 5, lines 22 through 23;
- Page 6, lines 1 through 23;
- Page 7, lines 1 through 10;
- Page 16, line 16 (to the period);
- Page 28, lines 6 (after period) through 8 (to the comma);

- Direct Testimony of William L. Gipson:
 - The summary section of the Executive Summary, this page is stricken;
 - Page 5, lines 6 through 19, not stricken;
 - Page 6, lines 1 through 8, not stricken;
 - Page 6, lines 9 through 22, stricken;
 - Page 7, lines 8 through 22, not stricken;
 - Page 8, lines 1 through 22, stricken;
 - Page 9, lines 1 through 4, stricken;
 - Page 10, lines 18 through 21, stricken;
 - Page 11, lines 1 through 11, stricken;

- Direct Testimony of W. Scott Keith:
 - Executive Summary text lines 3 through 4 from “the” through “179,” stricken;
 - Text line 9 (after end of sentence) through 12 (end of sentence), not stricken;
 - Line 12 (after period) through line 14 (end of sentence), stricken;
 - Lines 13 and 14, “discussion” through “ECR”, stricken;
 - Lines 20 through 21 after “(s).”, stricken;
 - Line 25 (up to the period), stricken;
 - Page 3, line 4 (after the comma) through line 5 (up to the Comma), stricken;
 - Page 3, under Topic, “and ECR”, stricken;
 - Page 6, line 10 through page 8, line 18, not stricken;
 - Page 13, line 12 through line 19, not stricken;
 - Page 22, line 5, between period and comma, stricken;
 - Page 23, lines 8 through 23, stricken;
 - Page 24 through 26, stricken in their entirety;
 - Page 27, lines 1 through 10, stricken;
 - Page 27, lines 11 through 23, not stricken;
 - Page 28, not stricken;
 - Page 29, lines 1 (after comma) through 4, stricken;
 - Page 29, lines 5 through 17, not stricken;
 - Page 29, lines 18 through 23, stricken;
 - Page 30, lines 1 through 22, stricken;
 - Page 31, lines 1 through 6, stricken;
 - Page 32, line 13, not stricken;
 - Schedule WSK-1, Section J, Schedule 1, page 1, line 20, not stricken;
 - Schedule WSK-2, stricken;
 - Schedule WSK-3, stricken;

- Schedule WSK-4, stricken;

- Direct Testimony of James H. Vander Weide:

- Page 53, lines 5 through 16, stricken;

- Page 54, lines 1 through 7, stricken.

IT IS ORDERED THAT:

1. The tariff pages as stated above are rejected.
2. The testimony as set forth above is stricken.
3. This order shall become effective June 25, 2006.

Davis, Chm., Murray, Gaw,
Clayton, and Appling, CC., concur

Dale, Chief Regulatory Law Judge

**In the Matter of the Assessment Against the Public Utilities in
the State of Missouri for the Expenses of the Commission
for the Fiscal Year Commencing July 1, 2006.**

Case No. AO-2006-0490

Decided June 23, 2006

Public Utilities §1. The Commission estimated the expenses to be incurred by it during the fiscal year to amount to \$17,695,619. These expenses were considered to be directly attributable to the six groups of public utilities: electrical, gas, heating, water, sewer, and telephone, which totaled for all groups \$8,965,786.

Public Utilities §5. The Commission assessed a total of \$15,362,712 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2007.

ASSESSMENT ORDER FOR FISCAL YEAR 2007

Pursuant to 386.370, RSMo Supp. 2005, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2006. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$17,695,619. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$8,965,786. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$8,729,833.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$289,400. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2006, is estimated to be \$2,043,507. The Commission deducts these amounts and estimates its Fiscal Year 2007 Assessment to be \$15,362,712. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2005, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric	\$ 5,955,985
Gas	\$ 3,967,583
Heating	\$ 97,036
Water	\$ 956,096
Sewer	\$ 324,117
Telephone	\$ 4,061,895
Total	\$15,362,712

The Commission allocates a proportionate share of the \$15,362,712 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2006. The assessment shall be due and payable on or before July 15, 2006, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2006, October 15, 2006, January 15, 2007, and April 15, 2007. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
Budget and Fiscal Services Department
P.O. Box 360
Jefferson City, MO, 65102-0360

IT IS ORDERED THAT:

1. The assessment for fiscal year 2007 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2006.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. This order shall become effective on July 1, 2006.

Davis, Chm., Murray, Gaw,
Clayton, Appling, CC., concur

Dale, Chief Regulatory Law Judge

Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC, pursuant to Section 251(b)(1) of the Telecommunications Act of 1996.*

Case No. TO-2006-0299

Decided June 27, 2006

Telecommunications §46.1. Socket Telecom, LLC filed a petition for arbitration with the Commission asking the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group, LLC. The Commission determined that these companies should form an interconnection agreement consistent with the Report and Order.

APPEARANCES

Bill Magness and Brad Bayliff, 98 San Jacinto Blvd., Suite 1400, Austin, Texas 78701. Attorney for Socket Telecom, LLC.

Larry W. Dority, Fischer and Dority, PC, 101 Madison, suite 400, Jefferson City, MO 65101. Attorney for CenturyTel of Missouri, LLC and Spectra Communications, LLC.

David Brown, Floyd Hartley and Gavin Hill, Hughes & Luce, L. L. P., 111 Congress Avenue, Suite 900, Austin, TX 7801. Attorneys for CenturyTel of Missouri, LLC. and Spectra Communications, LLC

Arbitrator: Kennard L. Jones, Administrative Law Judge

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Adam McKinnie, Regulatory Economist II, Missouri Public Service Commission.

Mike Schepeler, Regulatory Economist II, Missouri Public Service Commission.

Larry Henderson, Utility Operations Technical Specialist II, Missouri Public Service Commission.

FINAL COMMISSION DECISION

PROCEDURAL HISTORY

On January 13, 2006, Socket Telecom, LLC filed a petition for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, United States Code ("the Act"), and Commission rule 4 CSR 240-36.040. Socket asks the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communi-

* See pages 349 and 548 for other orders in this case.

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cations Group, LLC d/b/a CenturyTel of Missouri. The Arbitrator conducted an evidentiary hearing on April 13, 2006 and issued a final report on May 18.

During the course of these proceedings, the parties have settled a number of contested issues. Those issues will not be discussed in this Report.

STATEMENT OF FINDINGS AND CONCLUSIONS

Article II – Definitions

Issue 6 – Should the parties’ interconnection agreement extend obligations to CenturyTel affiliates?

Petitioner (Socket) – Socket argues that the definition of “currently available”, with regard to requested orders and services, should include services, features, functions and capabilities that CenturyTel and its affiliates are able to provide.¹

Respondent (CenturyTel) – CenturyTel argues that the definition of “currently available”, with regard to requested orders and service, should include service, features, functions and capabilities that it provides to itself and its end-users.²

Commission’s Decision – 47 C.F.R. 64.1903(3) states as follows:

The affiliate shall acquire any services from its affiliated exchange companies for which the affiliated exchange companies are required to file a tariff at tariffed rates, terms, and conditions. Nothing in this section shall prohibit the affiliate from acquiring any unbundled network elements or exchange services for the provision of a telecommunications service from its affiliated exchange companies, subject to the same terms and conditions as provided in an agreement approved under Section 252 of the [Telecommunications Act].

Based on the applicability of these requirements to CenturyTel’s operations, CenturyTel’s language most accurately describes the relationship by which CenturyTel is required to provide service to Socket.

Issue 14 – How should the interconnection agreement define “Information Access” and “Information Access Traffic”?

Petitioner (Socket) – Socket argues that its definition is simpler because it does not incorporate FCC decisions in the definition as CenturyTel has done. FCC decisions are subject to interpretation and bring unnecessary ambiguity to the definition.³

Respondent (CenturyTel) – CenturyTel argues that Socket’s definition improperly erects arbitrage opportunities, is inconsistent with the goals of the Telecommunications Act and sound economic and regulatory principles, and does not fairly allocate responsibility between the parties.⁴

Commission’s Decision – In its ISP Remand Order at paragraph 44, the FCC concluded that:

¹ Kohly Direct at 22-27 and rebuttal.

² Simshaw Direct 44-47.

³ Kohly Direct 28-31 and Rebuttal.

⁴ Simshaw 5-35, 39-42.

"Congress' reference to 'information access' in section 251 (g) was intended to incorporate the meaning of the phrase 'information access' as used in the AT&T Consent Decree ... Under the consent decree, 'information access' was purchased by 'information service providers' and was defined as 'the provision of specialized exchange telecommunications services ... in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services'. We conclude that this definition of 'information access' was meant to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."

Socket's language inserts the language: "and where necessary, the provision of network signaling and other functions." With the exception of this additional clause, Socket's language will be incorporated in the interconnection agreement.

Issue 15 - Which party's definition of "Internet Service Provider" should be used?

Petitioner (Socket) – Socket argues that its proposed definition comes directly from the FCC's ISP Remand Order, is simple and straightforward.⁵

Respondent (CenturyTel) – CenturyTel argues that Socket's proposed definition creates opportunities for arbitrage. CenturyTel emphasizes that this definition critically impacts how the parties treat Virtual NXX dial-up ISP traffic.⁶

Commission's Decision – At paragraph 11 of the ISP Remand Order, the FCC defines an Internet Service Provider as a subset of enhanced service providers. The FCC notes that ISPs may utilize LEC services to provide their customers with access to the Internet. As noted in Issue 14, the FCC determined that information access traffic flows to or from the Internet Service Provider. Therefore, Socket's language is most consistent with the FCC's definition.

Issue 16 – How should the parties' interconnection agreement define "IntraLATA Toll Traffic"?

Petitioner (Socket) – Socket argues that its definition is consistent with Missouri statutes, FCC and Missouri PSC rules.⁷

Respondent (CenturyTel) – CenturyTel argues that Socket's proposed definition does not adequately reflect the existing industry marketplace and is operationally problematic.⁸

Commission's Decision – An intraLATA toll call is one that stays within LATA boundaries but that is "between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."⁹ Socket's definition most closely reflects the intent of this definition.

⁵ Kohly Direct 31-32 and Rebuttal.

⁶ Simshaw 5-35, 39-42.

⁷ Kohly Direct 32-34 and Rebuttal.

⁸ Simshaw Direct 43 and Rebuttal.

⁹ 47 U.S.C. §153 (48).

Issue 34 – Which party's definition for Dedicated Transport is appropriate?

Petitioner (Socket) – Socket argues that its definition includes dedicated transport between a CenturyTel end office and a Spectra end office because these two entities are fully integrated, managed jointly, operating under the same name and in the same LATA.¹⁰

Respondent (CenturyTel) – CenturyTel argues that Socket's proposed definition is inconsistent with federal law and the FCC's Triennial Review Remand Order.

Commission's Decision – In its triennial review order at paragraph 366, the FCC states:

We find that a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities within an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches.

Specifically, 47 C.F.R. 51.309(e), when defining dedicated transport, discusses "one" of an ILEC's wire centers and "another of the" ILEC's wire centers or switches. Socket's inclusion of Spectra Communications Group LLC d/b/a CenturyTel's network does not comply with the definition of dedicated transport since Spectra's network is not within CenturyTel's network.

The Commission has expressed its dismay on several occasions that CenturyTel operates as one company when it is to its advantage, but operates as two entities, CenturyTel of Missouri, Inc. and Spectra, when that is more advantageous. Despite this concern, CenturyTel of Missouri, Inc. and Spectra are certificated as two separate entities providing service in Missouri. The Commission recognizes that the FCC rules appear to talk about single ILECs at times and multiple ILECs at other times.¹¹ "An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A route is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches."¹²

The Commission affirms the Arbitrator's Report on this issue.

Article III – General Provisions

Issue 2 – Should Socket's payment due date be 45 calendar days or 20 business date from the date of the bill?

Petitioner (Socket) – Socket argues that it needs a reasonable amount of time to review the bills because they are much more lengthy and complicated than retail phone bills and that a 45-day due date would accommodate that necessity.¹³

¹⁰ Kohly Direct 34-37 and Rebuttal.

¹¹ See definition of "dedicated transport" at 47 CFR 51.319.

¹² 47 CFR 51.319(e)

¹³ Kohly 37-41.

Respondent (CenturyTel) – CenturyTel argues that its system is configured on a 30 calendar-day and that this is comparable to 20 business days. Further, that it would have to expend considerable expense to reconfigure its system and that a due date that is 20 business days from the billing date is enough time for Socket to review the bill.¹⁴

Commission's Decision – The references to the rules in the Arbitration Report are appropriate because they clarify that, under existing rules, a “customer’s” obligation to pay a bill arises not from the date the bill is generated, or the bill date, but the date the bill readily available for the customer to review. Socket should not lose review time because CenturyTel has implemented a process that takes 4-5 days from the bill date for its internal quality assurance review. The Commission acknowledges that CenturyTel may incur costly modifications if it were to adjust its billing system to the “31 days” as determined in the Arbitrator’s Report. Therefore, the Commission finds that Socket’s due date shall be 20 business days from the rendition of the bill. As noted in the Arbitrator’s Report, “rendition of the bill is defined as the date a bill is mailed, posted electronically or otherwise sent to a customer.” If CenturyTel finds it necessary to apply a quality assurance review of the bills, it shall do so prior to starting the clock on Socket’s due date.

Issue 6 – How should changes in CenturyTel’s standard practices be communicated to Socket?

Petitioner (Socket) – Socket argues that its language envisions a greater level of cooperation between the parties in effecting changes and that CenturyTel’s proposal to provide the name of a person that Socket can contact is insufficient.¹⁵

Respondent (CenturyTel) – CenturyTel argues that, in light of Socket’s concerns of having to continuously monitor CenturyTel website for changes, CenturyTel has offered e-mail notifications as a reasonable solution.¹⁶

Commission’s Decision – The parties have agreed to the majority of the terms to govern changes in standard practices, with the most recent settlement being CenturyTel’s willingness to provide e-mail notification. The Commission rules that Socket’s language is preferable where notification will be by e-mail to designated Socket contacts and that CenturyTel will designate a qualified person for Socket to contact to provide clarification of the scope and timeline for the change. However, the Commission will not rule that either party may request the assignment of project team resources for implementation of the change. Socket’s language allows Socket to reserve the right to request that a change be delayed where there is an adverse business impact on Socket, with escalation through the dispute resolution process. Socket has rights dealing with qualified persons for contact with CenturyTel concerning changes and has options should the change adversely affect Socket without a party establishing project team resources.

Article V – Interconnection and Transport and Termination of Traffic

NOTE: With regard to Issues 7 and 10 of this Article, CenturyTel asks the Commission to review the Arbitrator’s Report and address inconsistencies related

¹⁴ P. Hankins Direct 11-16.

¹⁵ Kohly Direct 41-44.

¹⁶ P. Hankins Direct, 5-11 and Rebuttal.

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to reciprocal compensation determinations. The Commission has reviewed the few references noted by CenturyTel in its comments and at the oral argument and finds the Arbitrator's Report consistent with the ISP Remand Order.

The US Court of Appeals for the First Circuit recently stated, "The district court correctly noted that it was "unclear" whether the ISP Remand Order preempted state commissions from imposing access charges on all ISP-bound traffic." The Court noted that the FCC's brief in the appellate case stated, "The brief states that "[t]he ISP Remand Order does not provide a clear answer to [the] question" of whether the order "was intended to preempt states from establishing" a requirement of intercarrier compensation for interexchange VNXX ISP-bound calls. It notes that "[i]n some respects, the ISP Remand Order appears to address all calls placed to ISPs" but also that "the administrative history that led up to the ISP Remand Order indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area." Thus it concludes that the ISP Remand Order "can be read to support the interpretation set forth by either party in this dispute."

Thus, despite CenturyTel's claims that the ISP Remand Order is clear, the Court, and even the FCC itself, state the Order is not clear. Therefore, the Commission finds bill and keep will apply to virtual NXX traffic. Without more specific references from CenturyTel as to other areas it finds inconsistent, the Commission affirms the Arbitrator's Report.

Issue 5(A) – What methods and procedures should be included in the interconnection agreement to ensure interconnection arrangements are established and augmented efficiently?

The Commission notes that the issue statement is too broad to rule on either party's position and necessarily will address each Section of the interconnection agreement language, as proposed by the parties, in ruling on these issues.

Petitioner (Socket) – Socket proposes the following language: Upon request from Socket to establish an interconnection arrangement or augment an existing interconnection arrangement. Each Party shall designate a qualified person who will oversee the establishment of the requested interconnection. This person shall serve as a project coordinator and shall be knowledgeable of the processes and procedures for establishing interconnection including, but not limited to establishing the architecture, interconnection method, hand-off level, facility availability.

Respondent (CenturyTel) – CenturyTel proposes the following language: Upon request from Socket to establish an interconnection arrangement or augment an existing interconnection arrangement, Socket may invoke the provisions of Article III, Section 7 whereby the parties will ensure that current contact and escalation information is exchanged for all functions and processes involved in implementation of interconnection.

Commission's Decision – Section 2.1 – Either party should be able to assign a project coordinator, but no party should be required to assign a project coordinator or team as a general practice. The Commission finds CenturyTel's language acceptable on this issue. However, CenturyTel is expected to have someone knowledgeable and qualified to assist Socket in addressing issues and questions.

Section 2.2 – No disputed language.

Section 2.3

Petitioner (Socket) – Socket proposes the following language: 2.3 Upon Request, CenturyTel shall provide to Socket technical information about CenturyTel's network facilities in sufficient detail to allow Socket to achieve interconnection.

Respondent (CenturyTel) – CenturyTel proposed the following language: 2.3 Upon Request, CenturyTel shall provide to Socket non-proprietary technical information about CenturyTel's network facilities that is specific to Socket's provided and specific physical requirements for interconnection with Socket's network. Trunk group size shall be mutually agreed upon, based on traffic studies and availability of facilities. Socket shall compensate CenturyTel for the provision of this information through the non-recurring charge for the interconnection trunks ordered or through an Engineering Charge if Socket subsequently decides not to follow through with the interconnection method requested.

Commission's Decision – Section 2.3 – According to 47 C.F.R. 51.305(g), an ILEC shall provide to a requesting telecommunications carrier technical information about the ILEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of Section 51. Socket's language is most consistent with the intent of Section 51.305(g). To make the provision fully consistent, the Commission finds Socket's language should be modified to state; “. . . to achieve interconnection consistent with 47 C.F.R. 51.305”.

Section 2.4

Petitioner (Socket) – Socket proposes the following language: 2.4 In the event that CenturyTel asserts that it does not have the capacity to support an Interconnection Arrangement requested by Socket, CenturyTel shall provide a detailed explanation of the reason such capacity does not exist, identify any capacity that CenturyTel is reserving for its own use, and submit a construction plan for setting forth the timeline for adding the additional capacity. CenturyTel shall submit this plan to Socket and to the Manager of the Telecommunications Department of the Missouri Public Service Commission.

Respondent (CenturyTel) – CenturyTel proposes the following language: 2.4 In the event that CenturyTel does not have the capacity to support an Interconnection Arrangement requested by Socket, CenturyTel shall provide a detailed explanation of the reason such capacity does not exist. Should Socket wish CenturyTel to construct capacity to meet Socket's needs, CenturyTel and Socket shall work together to establish a construction plan and Socket shall bear all costs associated with engineering and constructing such capacity.

Commission's Decision – Section 2.4 – Because it states that the parties shall work together to construct capacity to meet Socket's needs, the Commission finds that CenturyTel's language is acceptable. An interconnection agreement should not place requirements on the Public Service Commission or its Staff. Further, Socket's additional language goes beyond what is expected of an ILEC.

Section 2.5

Petitioner (Socket) – Socket proposes the following language: 2.5 CenturyTel shall not delay processing and fulfilling or refuse to process and fulfill Socket's requests for additional interconnection facilities or capacity because CenturyTel believes Socket does not need the additional interconnection capacity.

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Respondent (CenturyTel) – CenturyTel proposes the following language:
2.5 In the event that Socket is under utilizing its existing trunks and requests an augment, a joint meeting shall be held to discuss a resolution to Socket's request. Provided that Socket agrees to bear all costs associated with engineering and constructing requested excess capacity, CenturyTel shall not delay processing and fulfilling or refuse to process and fulfill Socket's requests for additional interconnection facilities or capacity because CenturyTel believes Socket does not need the additional interconnection capacity.

Commission's Decision – Section 2.5 – According to 47 C.F.R. 51.305, an ILEC has the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network. An ILEC that denies a request for interconnection must prove to the state commission that interconnection is not technically feasible. The Commission finds that Socket's language is most consistent with the intent of the Section 51.305.

Section 2.5.1 and 2.5.2 – Because of the Commission's ruling on language in Section 2.5, this additional language is not needed.

Section 2.6.1 – There is no disputed language.

Issue 7 – Which party's contract language should be adopted regarding network interconnection provisions, including but not limited to, point of interconnection requirements, methods of interconnection, and use of the third party facilities?

The Commission notes that since each section title is addressing a different issue, both titles are acceptable. However, the parties will need to work to properly structure the numbering of sections.

Section 3.2

Petitioner (Socket) – Socket proposes the following language: 3.2 Socket may utilize facilities of third parties to satisfy all requirements herein, and CenturyTel shall, if requested by Socket, route Local Interconnection Traffic that is dialed to Socket's customers to Points of Interconnection of another provider for transiting to Socket, provided such Point(s) of Interconnection comply with requirements in this agreement and provided that Socket does not have trunking of its own to the same local calling areas. CenturyTel also shall, if requested by Socket, and if Socket's circuits are busy, route overflow traffic to a third-party provider's Point(s) of Interconnection, provided such Point(s) of interconnection comply with requirements herein. CenturyTel shall accept Socket's traffic routed by way of a third party's Point of Interconnection, provided such Point of Interconnection complies with requirements herein and provided that Socket's traffic complies with the requirements herein.

Respondent (CenturyTel) – CenturyTel proposes the following language:
3.2 The Parties shall reciprocally terminate Local Traffic, (or other traffic the Parties agree to exchange) originating on each other's networks utilizing either Direct or Indirect Network Interconnections as provided in Sections 4, 5 and 6 herein. To this end, the Parties agree that there will be interoperability between their networks. In addition, the Parties will notify each other of any reasonably anticipated material change in traffic to be exchanged, in terms of e.g., traffic type, volume. Socket may

utilize facilities of third parties to satisfy all requirements herein; however, any third party provider must meet the same interconnection trunk obligations under this agreement as must Socket in order for CenturyTel to route traffic bound for Socket to a third party provider.

Commission's Decision – Section 3.2 – Neither party's language is reasonable or necessary. Socket's intent is addressed in the transiting section of this Article. Socket's language would require CenturyTel to route traffic to a transiting provider when circuits are busy. The Commission is not aware of any such requirement and will not order CenturyTel to monitor traffic in this manner. CenturyTel's language includes a reference to "or other traffic the Parties agree to exchange". Either the traffic should be included in this agreement or it is covered by some other means such as a tariff. Further, CenturyTel's language includes the requirement to notify parties of any reasonably anticipated change in traffic. This concept is covered during the forecasting planning language. Beyond that, the language could require parties to disclose confidential business planning information.

Section 4.0

Petitioner (Socket) – Socket proposes the following: 4.0 REQUIREMENTS FOR ESTABLISHING POINTS OF INTERCONNECTION.

Respondent (CenturyTel) – CenturyTel proposes the following: 4.0 Direct Network Interconnection.

Commission's Decision – Section 4.0 – This section largely deals with the establishment of Points of Interconnection; therefore, Socket's language is acceptable.

Section 4.1

Petitioner (Socket) – Socket proposes the following language: 4.1 When direct interconnection is used, the Parties will interconnect their network facilities at a minimum of one Socket designated Point of Interconnection (POI) on CenturyTel's network in each LATA where Socket Offers Service.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.1 Direct Network Interconnection Architecture. In accordance with but only to the extent required by Applicable Law in Section 251 as codified in Part 51, the Parties shall provide interconnection of their networks at any technically feasible point and as specified in this Agreement. Socket may interconnect with CenturyTel on its network at any of the minimum Currently Available points required by the FCC. Interconnection at additional points will be reviewed on an individual case basis and must be mutually agreed upon. CenturyTel will work with Socket in all circumstances to install Interconnection Points within 120 calendar days absent extenuating circumstances. Internetwork connection and protocol must be based on industry standards developed consistent with Section 256 of the Act.

Commission's Decision – Section 4.1 – For purposes of clarifying the record in this case, the Commission finds it necessary to clarify its decision on this same issue in Case No. TO-2005-0336. Although the Commission supported Charter's proposed language, the Commission generally found that SBC may require an additional POI within the LATA if SBC can show that it is technically infeasible to keep using the POI or POIs already in place. Neither the Arbitrator's Report, nor the Commission's order, established a specific issue. Having made that clarification,

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the Commission agrees with the Arbitrator that, for sections related to the establishment of the POI, neither party's position is reasonable. Commission rule 4 CSR 240-36.040(5) (E) allows the arbitrator discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act. Based on the parties' comments on the Arbitrator's resolution of this issue, the Commission finds that the criteria for establishing an additional POI within a LATA need to be reconsidered and refined.

The Commission finds that a "one size fits all" approach is not appropriate because CenturyTel's exchanges range from less than 100 access lines to over 50,000 access lines. Therefore, the Arbitrator's solution, creating a methodology that varies with the size of the exchange is appropriate. In an effort to make that methodology more manageable, however, the Commission orders the following methodology to determine the necessity for another POI within a LATA. This methodology applies unless CenturyTel makes a showing that it is technically infeasible to maintain an existing POI based on specific circumstances.

Methodology for establishing an additional POI:

1. For each exchange in which there are 1,000 or less CenturyTel access lines, a POI will be established in that exchange when access lines directly attributable to Socket increase to a DS1 or 24-channel threshold.
2. For each exchange in which there are more than 1,000 CenturyTel access lines, the parties will apply a threshold of 2.4 percent per 1,000 access lines. In other words, if an exchange has 2,412 access lines, a new POI will be established when Socket's access lines reach the level of approximately 2.4 DS1s.
3. These thresholds apply to access lines attributable to Socket.
4. If the parties have a dispute as to the number of CenturyTel access lines in an exchange, the Commission Staff will assist in this dispute. If a dispute continues regarding the number of CenturyTel access lines in an exchange, either party can file seeking resolution from the Commission without following the normal dispute resolution process in the interconnection agreement.

Sections 4.1.1 and 4.2 are addressed in Section 4.1.

Section 4.3

Petitioner (Socket) – Socket proposes the following language: 4.3 The Parties agree that Socket has the right to choose a single POI or multiple POIs within the LATA.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.3 The Parties shall make available to each other one-way or two-way trunks, as mutually agreed upon, for the reciprocal exchange of Local Traffic.

Commission's Decision – Section 4.3 – Commission rule 4 CSR 240-29.050 outlines the requirements for establishing trunking. CenturyTel's language is not consistent with this provision of the Commission's Enhanced Records Exchange Rule.

Sections 4.3.1, 4.3.1.1 and 4.3.1.2 are addressed in Section 4.1.

Section 4.4

Petitioner (Socket) – Socket proposes the following language: 4.4 The additional POI(s) will be established within 90 days of notification that the threshold has been met.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.4 Neither Party is obligated under this Agreement to order reciprocal trunks or build facilities in the establishment of interconnection arrangements for the delivery of Information Access Traffic.

Commission's Decision – Section 4.4 – Socket's language has already been addressed in the decision under Section 4.1. CenturyTel's language addresses trunking, not POIs and will be addressed here. Section 51.305(f) requires an ILEC, if technically feasible, to provide two-way trunking upon request. CenturyTel's language is not consistent with this requirement.

Section 4.5

Petitioner (Socket) – Socket proposes the following language: 4.5 POIs shall be established at any technically feasible point inside the geographical areas in which CenturyTel is the franchised Incumbent LEC and on CenturyTel's network, including CenturyTel tandem offices, end offices as well as entrance facilities and outside plant, including a customer premise.

Respondent (CenturyTel) – CenturyTel proposes the following language: 4.5 [Not in Dispute] Socket will be responsible for engineering and maintaining its network on its side of the POI. CenturyTel will be responsible for engineering and maintaining its network on its side of the POI.

Commission's Decision – Section 4.5 – Socket's language has already been addressed in the decision related to Section 4.1. CenturyTel's language is not in dispute.

Section 4.6 and 4.7 are addressed in Section 4.1.

Section 5.0

Petitioner (Socket) – Socket proposes the following language: 5.0 Socket and CenturyTel will enter into a bill and keep arrangement for SS7 traffic provided that all SS7 traffic provisioned over the arrangement is associated with local interconnection traffic and that Socket has deployed a similarly situated SS7 network. In the event that Socket chooses to act as its own SS7 service provider, the parties will effectuate a Bill and Keep arrangement and shall share the cost of the SS7 quad links in each LATA between their STPs; provided, however, that said Bill and Keep arrangement and use of SS7 quad links apply only to Socket Local Interconnection Traffic and not to calls that are subject to traditional access compensation as found between a long distance carrier and a local exchange carrier, including Socket acting as a long distance carrier.

Respondent (CenturyTel) – CenturyTel proposes the following language: 5.0 New language inserted by Socket that does not have any corresponding

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language in CenturyTel's agreement template. CenturyTel does not understand Socket's intent so acceptance or any possible compromise language cannot yet be determined.

Commission's Decision – Section 5.0 – CenturyTel's language does not make sense since Socket's language was included in the Final Offer DPL. Socket's language was not addressed in testimony. Therefore, the Commission cannot rule on this language.

Section 6.0

Petitioner (Socket) – Socket proposes the following language: 6.0 INTERCONNECTION METHODS.

Respondent (CenturyTel) – CenturyTel proposes the following language: 6. X New language inserted by Socket that does not have any corresponding language in CenturyTel's agreement template. See CenturyTel section 4.1

Commission's Decision – Section 6.0 – CenturyTel's language does not make sense since Socket's language was included in the Final Offer DPL. Socket's language outlines the various methods allowed for interconnection in Section 51.321. As previously stated, an ILEC has the duty to provide interconnection at any technically feasible point unless it proves to the state commission that interconnection at that point is not technically feasible. CenturyTel has not proven to the Commission that Socket's language is not technically feasible. The Commission finds Socket's language acceptable.

Sections 6.1 – 6.1.6 are addressed in Section 6.

Section 6.2 and 6.2.1 – In Issue 6, Socket objects to cross-referencing another Article so the Commission finds that cross-references will not be allowed here.

Section 11.6 – 11.6.2 – The Commission has addressed calling scopes in other issues and with other language. This language is unnecessary and duplicative.

Issue 8 – Which party's language should be adopted regarding indirect interconnection?

The Commission notes that this issue statement is too broad to rule on either party's position generically. The Commission necessarily will address each Section of the Interconnection Agreement language in ruling on this issue.

Section 7.0 – There is no disputed language in this section.

Section 7.1

Petitioner (Socket) – Socket proposes the following language: 7.1 Where one party chooses to route traffic through a third-Party Transit provider, the third party must have a POI with the originating and terminating carrier in the same LATA as the originating and terminating Parties' Local Routing Numbers ("LRN") as defined in the LERG. Each Party must have connection to the third Party.

Respondent (CenturyTel) – CenturyTel proposes the following language: 7.1 Where Parties agree to route traffic through a third-Party Transit provider, the third party tandem switch must be in the same LATA as the originating and terminating Parties' Local Routing Numbers ("LRN") as defined in the LERG. Each Party must have connection to the third Party tandem.

Commission's Decision – Section 7.1 – Section 251(a)(1) requires each telecommunications carrier to interconnect directly or indirectly with the facilities

and equipment of other telecommunications carriers. Socket's language, which allows a party to choose indirect interconnection, is most consistent with this requirement.

Section 7.2

Petitioner (Socket) – Socket proposed no language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language:
7.2 Indirect Network Connection is intended to handle de minimus mutual Local Traffic exchange until Local Traffic volumes grow to a point where it is economically advantageous to provide a direct connection.

Commission's Decision – Section 7.2 – Section 251(a)(1) requires each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. In the M2A, the Commission found, "A CLEC may choose to indirectly interconnect with SBC Missouri by using the facilities of another carrier. Such indirect interconnection does not release the CLEC from any of the obligations to which it is held under the agreement." CenturyTel's language attempts to place conditions on Socket's choice of indirect interconnection that are not conducive to Section 251(a)(1) and this Commission's previous interpretation of that section.

Section 7.3

Petitioner (Socket) – Socket did not provide any language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language:
7.3 To the extent that the Parties have utilized any Indirect Network Connection for exchange of Local Traffic, they agree to convert such connection to a direct connection when 1) traffic volumes over such connection reach a DS-1 equivalent, or 2) either Party is being charged more than \$500 monthly in transiting charges.

Commission's Decision – Section 7.3 – Language for this section has already addressed in response to CenturyTel's language at 7.2.

Section 7.4

Petitioner (Socket) – Socket did not provide any language for this section

Respondent (CenturyTel) – CenturyTel proposes the following language:
7.4 Neither Party shall deliver traffic destined to terminate at the other Party's end office via another LEC's end office except as provided for in Section 4.4.5.

Commission's Decision – Section 7.4 – Language for this section has already addressed in response to CenturyTel's language at 7.2.

Issue 9 – Should interconnection facilities compensation be based on each party taking responsibility for bringing its facilities to the point of interconnection?

The Commission notes that the issue statement is too broad to rule on either party's position and necessarily will address each Section of the interconnection agreement language in ruling on these issues.

Section 8.1 – No disputed language.

Section 8.2

Petitioner (Socket) – Socket proposed no language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language:
8.2 When the POI is a Collocation, Article XVI terms will apply in addition to the terms of this Article.

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Commission's Decision – Section 8.2 – In Issue 8 – CenturyTel objects to cross-referencing another Article so the Commission finds that cross-references will not be allowed here.

Section 8.3

Petitioner (Socket) – Socket provided no language for this section.

Respondent (CenturyTel) – CenturyTel proposes the following language:
8.3 To the extent that the interconnection facility is used for both local traffic as defined in Article II and for non-local traffic, non-local traffic shall be billed in accordance with the party's applicable access tariff.

Commission's Decision – Section 8.3 – CenturyTel's language references non-local traffic not subject to an interconnection agreement so this reference and language is not necessary.

Issue 10 – What language should the interconnection agreement include regarding intercarrier compensation for transport and termination of traffic?

Petitioner (Socket) – Socket proposes the following title: 9.0 INTERCARRIER COMPENSATION FOR LOCAL INTERCONNECTION TRAFFIC.

Respondent (CenturyTel) – CenturyTel proposes the following title: 9.0 Transport and Termination of Traffic.

The Commission notes that this issue statement is too broad to rule on either party's position. The Commission necessarily will address each Section of the Interconnection Agreement language in ruling on this issue. The Commission finds that both titles accurately reflect the intent of this section. As such, this section should be titled: Intercarrier Compensation for Transport and Termination of Traffic subject to this Interconnection Agreement. The parties are directed to correct numbering to accommodate the Commission's decision on Issue 10.

Section 9.1

Petitioner (Socket) – Socket proposes the following language: 9.1 This section addresses Intercarrier Compensation for the exchange of Local Interconnection Traffic.

Respondent (CenturyTel) – CenturyTel proposes the following language:
9.1 Traffic to be Exchanged. The Parties shall reciprocally terminate Local Traffic including MCA traffic, (or other traffic the Parties agree to exchange) originating on each other's networks utilizing either Direct or Indirect Network Interconnections as provided in Sections 4, 5 and 6 herein. To this end, the Parties agree that there will be interoperability between their networks. In addition, the Parties will notify each other of any reasonably anticipated material change in traffic to be exchanged, in terms of e.g., traffic type, volume.

Commission's Decision – Section 9.1 – Neither party's language is reasonable or necessary. Socket's intent is covered by Section 9.0. CenturyTel's language includes the language; "or other traffic the Parties agree to exchange". Either the traffic should be included in this agreement or it is covered by some other means such as a tariff. Further, CenturyTel's language includes the requirement to notify parties of any reasonably anticipated change in traffic. This concept is covered during the forecasting planning language. Beyond that, the language could require parties to disclose confidential business planning information.

Section 9.2

Petitioner (Socket) – Socket proposes the following language: 9.2 MCA Traffic is traffic originated by a party providing a local calling scope pursuant to the Case No. TO-92-306 and Case No. TO-99-483 (MCA Orders) and routed as a local traffic based on the calling scope of the originating party pursuant to the MCA Orders.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2 Compensation For Exchange of Local Traffic.

Commission's Decision – Section 9.2 – Socket's language is the same as CenturyTel's language for MCA Traffic which appears as 9.2.XX FX Traffic (CenturyTel proposes inserting the following in Article II-Definitions). There does not appear to be a dispute on this language. CenturyTel's intent is addressed in Section 9.0 and is not needed at this time. Parties are directed to correct the numbering to address the Commission's ruling on Issue 10.

Section 9.2.1

Petitioner (Socket) – Socket proposes the following language: 9.2.1 Compensation for MCA Traffic will be consistent with the Commission's decisions in Case No. TO-92-306 and Case No. TO-99-483.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2.1 Local Mutual Compensation. The Parties shall compensate each other for the exchange of Local Traffic originated by or terminating to the Parties' end-user customers in accordance with Section 3.2.2 of this Article, subject to any applicable regulatory conditions, such as a State exempt factor, if any. The Charges for the transport and termination of optional EAS, intraLATA toll and interexchange traffic shall be in accordance with the Parties' respective intrastate or interstate access tariffs, as appropriate.

Commission's Decision – Section 9.2.1 – The Commission finds Socket's language acceptable. CenturyTel's language is not acceptable since it does not appear the "local mutual compensation" is defined by the agreement, the language references a Section that cannot be found in the Article (Section 3.2.2); "state exempt factor" does not appear to be defined and contains references to non-local traffic that should not be in an interconnection agreement.

Section 9.2.2

Petitioner (Socket) – Socket proposes the following language: 9.2.2 The parties agree to use the Local Exchange Routing Guide (LERG) to provision the appropriate MCA NXXs in their networks. The LERG should be updated in accordance with industry standards for opening a new code to allow the other party the ability to make the necessary network modifications. If the Commission orders the parties to use an alternative other than the LERG, the parties will comply with the Commission's final order.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2.2 Bill and Keep. Either Party may initiate a traffic study no more frequently than once a quarter. Such traffic study shall examine all Local Traffic excluding Local Traffic that is also Information Access Traffic. Should such traffic study indicate, in the aggregate, that either Party is terminating more than sixty percent (60%) of the Parties' total terminated minutes for Local Traffic, excluding Local Traffic that is also Information Access Traffic, either Party may notify the other that mutual compensation will commence pursuant to the rates set forth in Appendix A of this Agreement

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and following such notice it shall begin and continue for the duration of the Term of this Agreement unless otherwise agreed. Local Traffic that is also Information Access Traffic will remain subject to Bill-and-Keep.

Commission's Decision – Section 9.2.2 – The Commission does not find it necessary to include Socket's language, but the section is factually correct so no harm is created by its inclusion. CenturyTel's language addresses bill and keep generally, which corresponds more closely with Socket's language at Sections 9.4.1 and 9.4.2. The Commission cannot make a ruling on CenturyTel's language since it refers to a compensation arrangement contained in Appendix A which does not appear to be in the record.

Section 9.2.3

Petitioner (Socket) – Socket proposed no language on the section.

Respondent (CenturyTel) – CenturyTel proposes the following language: 9.2.3 VNXX Traffic. If Socket assigns NPA/NXXs to a customer physically located outside of the CenturyTel Local Calling Area containing the rate center with which the NPA/NXX is associated, traffic originating from CenturyTel customers within that CenturyTel Local Calling Area to Socket customer physically located outside of the CenturyTel Local Calling Area, shall not be deemed Local Traffic but shall be at bill and keep (provided that Socket agreed to maintain the terms of the recent addendum agreement between CenturyTel and Socket whereby Socket agreed to place a POI at every CenturyTel end office and where all ISP-bound traffic is at bill and keep. Should Socket not agree to abide by its recent addendum terms, CenturyTel reserves the right to revert to its advocacy position on this issue which is that access charges do apply to all ISP-bound traffic that terminates to a physical ISP location outside of the local calling area.)

Commission's Decision – Section 9.2.3 – The Commission finds that CenturyTel's language is consistent with the ISP Remand Order and there is nothing prohibiting a bill and keep arrangement in that order. The language in the parenthetical is not consistent with the Commission's finding on the establishment of the POI and shall be eliminated.

Section 9.2.X and Section 9.2.XX – There is no disputed language.

Section 9.3

Petitioner (Socket) – Socket proposes the following language: 9.3 Non-MCA Traffic is all Section 251(b) (5) Traffic, ISP Traffic, Foreign Exchange Traffic including VNXX Traffic, and Transit Traffic that is not defined as MCA Traffic.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.3 – MCA traffic is specifically defined through the references to Case No. TO-92-306 and Case No. TO-99-483. By default all other traffic is "non-MCA" traffic. Socket's language is not necessary.

Section 9.4

Petitioner (Socket) – Socket proposes the following language: 9.4 Compensation for Non-MCA Section 251(b)(5) Traffic, Non-MCA ISP Traffic and Non-MCA Foreign Exchange Traffic including VNXX Traffic.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.4 – This language is not necessary based on the decisions in Sections 9.4.1 and 9.4.2.

Section 9.4.1

Petitioner (Socket) – Socket proposes the following language: 9.4.1 All non-MCA Traffic, including Non-MCA Section 251(b)(5) Traffic, Non-MCA ISP Traffic, Non-MCA Foreign Exchange Traffic including VNXX Traffic shall be exchanged on a Bill and Keep basis.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.4.1 – CenturyTel's language at Section 9.2.3, addressing the appropriate application of bill and keep, is appropriate. Other traffic included in this section has been deemed non-local traffic through other determinations.

Section 9.4.2

Petitioner (Socket) – Socket proposes the following language: 9.4.2 "Bill and Keep" refers to an arrangement in which neither of two interconnecting parties charges the other for terminating FX traffic that originates on the other party's network.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.4.2 – 47 C.F.R. 51.713 defines bill-and-keep arrangements as those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network. Socket's language, with the removal of the reference to terminating FX traffic, is acceptable and consistent with this definition.

Section 9.5

Petitioner (Socket) – Socket proposes the following language: 9.5 The Parties may mutually agree to another compensation arrangement. In the event the Parties do mutually agree to another Intercarrier Compensation arrangement, the Parties will make the necessary amendment to the Interconnection Agreement to include that arrangement in the Agreement.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.5 – This is a requirement of 4 CSR 240-3.513 and unnecessary for inclusion in this agreement.

Section 9.6

Petitioner (Socket) – Socket proposes the following language: 9.6 Compensation for Termination of Non-PIC'd IntraLATA Interexchange Toll Traffic.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.6 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Section 9.6.1

Petitioner (Socket) – Socket proposes the following language: 9.6.1 IntraLATA Interexchange Traffic that is carried on jointly provided LEC-to-LEC network is considered as IntraLATA Toll Traffic and is subject to tariffed access charges. Billing arrangements are outlined in Section 10 – Recording and Billing of this Article.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision - Section 9.6.1 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

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Section 9.6.2

Petitioner (Socket) – Socket proposes the following language: 9.6.2 Compensation for the termination of this traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including Carrier Common Line (CCL) charge, as set forth in each Party's intrastate access tariff(s).

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.6.2 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Section 9.6.3

Petitioner (Socket) – Socket proposes the following language: 9.6.3 For interstate IntraLATA service compensation for terminating of Intercompany traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including the Carrier Common Line (CCL) charge, as set forth in each Party's interstate access service tariffs or interstate price sheet.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 9.6.3 – Socket's language references non-local traffic not subject to an interconnection agreement, so this reference and language is not necessary.

Issue 11 – What are the appropriate rates, terms and conditions for compensation for transit traffic?

Petitioner (Socket) – Socket proposes the following language: 10.0 TRANSIT TRAFFIC.

Respondent (CenturyTel) – CenturyTel proposes the following language: 10.0 The Parties will provide Tandem Switching for Local Traffic between the Parties' end offices subtending each other's access Tandem, as [in the following subsections].

Commission's Decision – Section 10.0 (and the proceeding subsections) – The Missouri Public Service Commission has already decided that transiting is a §251 obligation. In the Final Arbitrator's Report in Case No. TO-2005-0336, the Commission ruled that transiting is a §251 obligation quoting its Chariton Valley Order where the Commission determined that "transit service falls within the definition of interconnection service . . . [b]ecause the transit agreement is an interconnection service, it must be filed with the Commission for approval." The Commission concludes that the Act, at §251(c)(2) and at §251(a)(1) obligates CenturyTel to receive transit traffic from Socket. Because transit traffic is an obligation imposed on CenturyTel pursuant to §§251(c)(2) and (3) of the Act, the applicable pricing standard is TELRIC. This allows Socket to effect an indirect interconnection with other carriers, which is expressly authorized by §251(a)(1) of the Act.

Issue 12 – Should the parties agree to trunking, forecasting, availability of facilities, and requirements prior to exchanging traffic?

Section 11.0 – No disputed language in this section.

Section 11.1

Petitioner (Socket) – Socket proposes the following language: 11.1 Trunking Requirements: The interconnection of Socket and CenturyTel networks shall be designed to promote network efficiency. CenturyTel will not impose any restrictions on Socket that are not imposed on its own traffic with respect to trunking and routing options afforded to Socket. In accordance with Article III, it will be necessary for the Parties to have met and discussed trunking, forecasting, availability and requirements in order for the Parties to begin exchange of traffic.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.1 Trunking Requirements: In accordance with Article III, it will be necessary for the Parties to have met and agreed on trunking, forecasting, availability and requirements in order for the Parties to begin exchange of traffic.

Commission's Decision – Section 11.1 – 47 CFR 51.305(a)(3) requires CenturyTel to provide interconnection at a level of quality that is equal to that which the ILEC provides itself, a subsidiary, an affiliate, or any other party. Socket's language is consistent with this requirement.

Issue 13 – Where available, should there be a preference for two-way trunks?

Section 11.1.1

Petitioner (Socket) – Socket proposes the following language: 11.1.1 The Parties agree to establish trunk groups of sufficient capacity from the interconnecting facilities such that trunking is available to any switching center designated by either Party, including end offices, tandems, and 911 routing switches. Where available, the Parties will use two-way trunks for delivery of Local Interconnection Traffic, or either Party may elect to provision its own one-way trunks for delivery of Local Interconnection Traffic to the other Party. If a Party elects to provision its own one-way trunks, when two-way trunking is available, that Party will be responsible for its own expenses associated with the trunks. If two-way trunking is not available, the Parties shall use one-way trunking for the exchange of Local Interconnection Traffic and each Party will be responsible for its own expenses associated with its own one-way trunks.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.1.1 The Parties agree to establish trunk groups of sufficient capacity from the interconnecting facilities such that trunking is available to any switching center designated by either Party, including end offices, tandems, and 911 routing switches. The Parties will mutually agree where one-way or two-way trunking will be available. The Parties may use two-way trunks for delivery of Local Traffic, or either Party may elect to provision its own one-way trunks for delivery of Local Traffic to the other Party. If a Party elects to provision its own one-way trunks, that Party will be responsible for its own expenses associated with the trunks.

Commission's Decision – 47 CFR 51.305(f) requires an ILEC, if technically feasible, to provide two-way trunking upon request. Socket's language is most consistent with this requirement.

Issue 14 – Should the agreement contain definitive trunking requirements? If so, what trunking requirements should the agreement contain?

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Section 11.1.2

Petitioner (Socket) – Socket proposes the following language:

11.1.2 The parties shall establish trunk group as follows:

11.1.2.1 The Parties shall make available to each other two-way trunks (where available) for the reciprocal exchange of combined 251(b)(5) Traffic, ISP Traffic, Foreign Exchange Traffic, Transit Traffic, and non-PIC'd or non-equal access IntraLATA toll traffic. In the event two-way trunking is not available, each party will route combined 251(b)(5) Traffic, ISP Traffic, Foreign Exchange Traffic, Transit Traffic, and non-PIC'd or non-equal access IntraLATA toll traffic on one-way trunk groups.

11.1.2.1.1 Where Socket Offers Service for the exchange of Local Interconnection Traffic in an LCA that is not within an MCA, Socket shall establish dedicated trunking to each End-Office that is not a Remote End-Office in that LCA when forecasted or actual traffic volumes exceed 24 DS0s at peak.

11.1.2.1.2 Where Socket Offers Service for the exchange of Local Interconnection Traffic in an LCA that is within an MCA, Socket shall establish dedicated trunking to Local Tandem or to a single End-Office that is not a Remote End-Office within the MCA when forecasted or actual traffic volumes exceed 24 DS0s at peak.

11.1.2.1.3 Additional Dedicated Trunking may be established by mutual agreement of the Parties.

11.1.2.2 Meet Point Traffic will be transported between the CenturyTel Access Tandem Switch and Socket over a "meet point" trunk group separate from the Local Interconnection Trunk Groups. This trunk group will be established for the transmission and routing of Exchange Access traffic (InterLATA and IntraLATA Toll Traffic routed via an IXC) between end users of one Party attempting to use an interexchange carriers connected to the other Party's Switch. If CenturyTel has more than one Access Tandem Switch within a Local Exchange Area, Socket may utilize a single "meet point" trunk group to one CenturyTel Access Tandem Switch within the Local Exchange Area in which Socket homes its NPA/NXXs. This trunk group will be provisioned as two-way and will utilize SS7 protocol signaling. Traffic destined to and from multiple IXCs can be combined on this trunk group.

11.1.2.3 Separate Trunks will be utilized for connecting Socket's switch to the POI and ultimately to each 911/E911 tandem or selective router. This trunk group will be set up as a one-way outgoing only and will utilize SS7 protocol unless SS7 protocol signaling is not yet available, then CAMA/ANI MF signaling will be utilized.

Respondent (CenturyTel) – CenturyTel proposes the following language:

11.1.2 Socket and CenturyTel shall, where applicable, make reciprocally available, by mutual agreement, the required trunk groups to handle different traffic types. Socket and CenturyTel will support the provisioning of trunk groups that carry combined or separate Local Traffic. CenturyTel requires separate trunk groups from Socket to originate and terminate Non-Local Traffic calls and to provide Switched Access Service to IXCs.

Commission's Decision (Issue 14) – According to 4 CSR 240-29.050, "At its discretion, a terminating carrier may elect to establish separate trunk groups for inter-exchange carrier (IXC) and Local Exchange Carrier-to-Local Exchange Carrier (LEC-to-LEC) traffic. Terminating tandem carriers shall work cooperatively

with, and abide by requests of, terminating carriers to establish separate trunking arrangements for IXC and LEC-to-LEC traffic occurring between a terminating tandem carrier and a terminating end office." This Commission has already addressed issues related to separate trunking for IXC traffic and the requirements to establish two-way trunking in Case No. TO-2005-0336.

In that decision, the Commission found that "the Commission's rules require originating and transiting carriers to deliver certain traffic over separate trunks. To the extent that the traffic is being terminated to SBC Missouri, SBC Missouri may dictate that it be delivered over separate trunk groups. Except as necessary to comply with the Commission's rules, SBC Missouri may not limit the types of traffic that pass over interconnection facilities or require that traffic be routed or separated in a given way." At Section V – Page 19, the Commission also found, "SBC Missouri may not require two-way trunking against the wishes of the CLEC. Also noted above, SBC Missouri may have the ability, pursuant to the Commission's rules (ERE Rules) that become effective July 30, 2005, to require separate trunking for traffic that terminates to it."

The Commission finds that the Arbitrator erred in selecting CenturyTel's language on this issue. The Commission also finds that neither party's language entirely complies with previous Commission decisions and Commission rules. The purposes of establishing separate trunk groups should be to allow for the proper identification and compensation of traffic and to prevent blocked calls. The parties are directed to incorporate language in the interconnection agreement that complies with the Commission's previous determinations and rules and recognizes the purposes stated above.

Issue 15 – Should the parties be required to mutually agree on one point of interconnection in each CenturyTel local calling area?

Petitioner (Socket) – Socket proposed no language on this issue.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.1.3.1 As stated in 4.2, the Parties will mutually designate at least one POI on CenturyTel's network within each CenturyTel local calling area to which Socket exchanges 24 DS0s worth of traffic at peak over three consecutive months, for the routing of Local Traffic.

Commission's Decision – The parties should not be required to mutually agree on the establishment on one POI in each CenturyTel local calling area. CenturyTel's language is not consistent with the Commission's decision on establishing POIs.

Issue 18 – Should CenturyTel's language regarding joint planning criteria that is already included in Article III be repeated in Article V.

Petitioner (Socket) – Socket proposed no language on this issue.

Respondent (CenturyTel) – CenturyTel proposes the following language: 11.4 Joint Trunk Planning Criteria. In order to facilitate sound and economical network planning and provisioning, the Parties agree to work cooperatively to establish appropriate: (i) fill factors for trunks previously deployed for the Socket; (ii) compensation arrangements to reflect CenturyTel's and the Socket's proportionate use of the trunking; (iii) strand plant or special construction termination charge to Socket for not utilizing the ordered trunking; and (iv) to establish appropriate time frames to reflect whether the Socket ordered trunking is currently available.

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Commission's Decision – CenturyTel's language should not be repeated in Article V. Consistent with the Commission's decision in Section 11.1 of this agreement, CenturyTel's language for planning and forecasting is not necessary and should not be included in the agreement.

Issue 20 – Should this Article recognize that terminating carriers may rely on terminating records for billing the originating carrier?

Section 12.3 – There is no disputed language.

Section 12.3.3

Petitioner (Socket) – Socket proposes the following language: 12.3.3 The terminating carrier will use the originating and terminating caller identification numbers or Automatic Number Identification as defined in 4 CSR 240-29.020(4) to determine the jurisdiction of the call.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 12.3.3 – Socket states that this issue is not covered by the Commission's ERE rule, but the only language at issue specifically references the use of the ERE rule to determine the jurisdiction of the call. Since it appears Socket's concerns are addressed by the ERE rule, the Commission affirms the Arbitrator's decision.

Issue 21 – Should service ordering, provisioning, and maintenance standards be included in the interconnection agreement?

Petitioner (Socket) – Socket stated that its language, concerning these subjects, is addressed in the comprehensive OSS Article XIII and Article III.

Respondent (CenturyTel) – CenturyTel proposes the following language: 12.3 Service Ordering, Service Provisioning, and Billing. Except as specifically provided otherwise in this Agreement, service ordering, provisioning, billing and maintenance for non-access services shall be governed by the CenturyTel Service Guide. CenturyTel will provide Socket with advance notice of changes to CenturyTel's procedures as stated in the Service Guide and Socket has the right to raise a valid dispute under the terms of this agreement if a change materially affects Socket's service. If there is any variation in the terms of this agreement and the terms in CenturyTel's Service Guide, the terms of this agreement shall prevail.

Commission's Decision – As much information as possible should be included in an interconnection agreement dictating the interactions and operations between parties. It is also reasonable for an ILEC to have guides or manuals to provide additional guidance to CLECs. CenturyTel's language is acceptable; however, CenturyTel is expected to provide clear and prompt notices of changes to its procedures consistent with the Commission's decision in Article XIII - OSS.

Issue 24 – In the event one carrier is unable to provide meet-point billing data, should that carrier be held liable for the amount of unbillable charges?

Petitioner (Socket) – Socket proposes the following language: 1.3.1.8 If Meet-Point Billing Data is not processed and delivered by either CenturyTel or Socket within 30 days of the call date and, in turn, a Party is unable to bill the IXC for the appropriate charges, the Party who failed to deliver the data will be held liable for the amount of unbillable charges.

Respondent (CenturyTel) – CenturyTel proposed no language on this issue.

Commission's Decision – The Commission agrees with the Arbitrator's decision that Socket's language is not necessary. However, the Commission makes this finding for a different reason than that stated in the Arbitrator's Report. Socket's language expects billing data to be submitted within 30 days of the date of each call. A live interface would be required to receive and transmit billing data within 30 days of each call. The Commission, in addressing Article XIII, has clarified that it will not order to provide real-time access to its systems and will not require "extensive system overhauls". Chapter 29 reference billing cycles for other types of traffic and that type of methodology may be applied here if additional guidance is needed. The Commission affirms the Arbitrator's decision.

Issue 26 – Should each party be required to pass calling party number (CPN) information to the other party?

Petitioner (Socket) – Socket proposes the following language: 16.2 Each Party will transmit call detail information to the other for each call being transited to or terminated on the other's network in compliance with the provisions of the Missouri Enhanced Records Exchange Rule; 4 CSR 240, Chapter 29.

For traffic that is not covered by that rule, including but not limited to meet-point traffic, each Party will include in the information transmitted to the other for each call being terminated on the other's network (where technically available to the transmitting party), the originating Calling Party Number (CPN). For all traffic originated on a Party's network including, without limitation, Switched Access Traffic, and wireless traffic, such Party shall provide CPN as defined in 47 C.F.R. § 64.1600(c) ("CPN"). Each Party to this Agreement will be responsible for passing on any CPN it receives from a third party for traffic delivered to the other Party. In addition, each Party agrees that it shall not strip, alter, modify, add, delete, change, or incorrectly assign any CPN. If either party identifies improper, incorrect, or fraudulent use of local exchange services (including, but not limited to PRI, ISDN and/or Smart Trunks), or identifies stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned CPN, the Parties agree to cooperate with one another to investigate and take corrective action.

Respondent (CenturyTel) – CenturyTel proposes the following language: 16.2 Each Party will transmit call detail information to the other for each call being terminated on the other's network, including calls that transit to the other from third party carriers, in compliance with the provisions of the Missouri Enhanced Records Exchange Rule; 4 CSR 240, Chapter 29, except that the obligation regarding transiting traffic is limited only to the unaltered transmission of call detail information as provided by the call originator.

For traffic that is not covered by that rule, each Party will include in the information transmitted to the other for each call being terminated on the other's network (where technically available to the transmitting party), the originating Calling Party Number (CPN). For all traffic originated on a Party's network including, without limitation, Switched Access Traffic, and wireless traffic, such Party shall provide CPN as defined in 47 C.F.R. § 64.1600(c) ("CPN"). Each Party to this Agreement will be responsible for passing on any CPN it receives from a third party for traffic delivered to the other Party. In addition, each Party agrees that it shall not strip, alter, modify,

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add, delete, change, or incorrectly assign any CPN. If either party identifies improper, incorrect, or fraudulent use of local exchange services (including, but not limited to PRI, ISDN and/or Smart Trunks), or identifies stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned CPN, the Parties agree to cooperate with one another to investigate and take corrective action.

Commission's Decision – Section 16.2 – The Commission finds Socket's language most acceptable. CenturyTel's language includes an exception to Chapter 29 of the Commission's rules that is not acceptable and is already addressed in "agreed-upon" language in the same section.

Section 16.3 – No disputed language.

Issue 31 – Should Socket's proposed language regarding the exchange of enhanced/information service traffic be included in the agreement?

Petitioner (Socket) – Socket proposes the following language: 17.0 EXCHANGE AND COMPENSATION FOR IS TRAFFIC.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – Section 17.0 – Socket is correct that the Commission's order in Case No. TO-2005-0336 reversed the Arbitrator's decision on MCI RC Issue 15, specifically addressing traffic that "falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates." However, the language proposed by Socket in this issue is language contained in MCI RC 17 in that same case. On that issue, the Arbitrator's decision determined that SBC's language was most appropriate and the Commission did not reverse that decision. Therefore, the Commission finds that the Arbitrator's Report is consistent with the previous Commission decision. The language should either be removed in its entirety or the exact MCI RC 15 language should be incorporated in this interconnection agreement.

Section 17.1

Petitioner (Socket) – Socket proposes the following language: 17.1 Notwithstanding any other provision of this Agreement, the Parties shall exchange enhanced/information services traffic, including without limitation Voice Over Internet Protocol ("VOIP") traffic and other enhanced services traffic (collectively, "IS Traffic"), in accordance with this section. IS Traffic is defined as traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or traffic that features enhanced services that provide customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information.

The Parties shall exchange IS Traffic over the same interconnection trunk groups used to exchange local traffic. In addition to other jurisdictional factors the Parties may report to one another under this Agreement, the Parties shall report a Percent Enhanced Usage ("PEU") factor on a statewide basis or as otherwise determined by Socket at sole discretion. The numerator of the PEU factor shall be the number of minutes of IS Traffic sent to the other Party for termination to such other Party's customers. The denominator of the PEU factor shall be the total combined number of minutes of traffic, including IS Traffic, sent over the same

trunks as IS Traffic. Either Party may audit the other Party's PEU factors pursuant to the audit provisions of this Agreement.

The Parties shall compensate each other for the exchange of IS Traffic applying the same rate elements used by the Parties for the exchange of ISP-bound traffic whose dialing patterns would otherwise indicate the traffic is local traffic. This compensation regime for IS Traffic shall apply regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.

Respondent (CenturyTel) – CenturyTel proposed no language on this section.

Commission's Decision – This issue has been addressed in previous sections of this Article. Socket's language will not be accepted by the Commission as it conflicts with these previous determinations and previously offered language.

Issue 32 – How should the interconnection agreement define the term "Foreign Exchange"?

Petitioner (Socket) – Socket proposes the following language: 1.49 "Foreign Exchange (FX)" services are service offerings of local exchange carriers that are purchased by customers, which allow such customers to obtain exchange service from a mandatory local calling area other than the mandatory local calling area where the customer is physically located. Examples of this type of service include, but are not limited to, Foreign Exchange Service, CENTREX CUSTOPAK with Foreign Exchange Telephone Service Option, and ISDN-PRI Out-of-Calling Scope (both and Two-Way and Terminating Only).

Respondent (CenturyTel) – CenturyTel proposed no language on this issue.

Commission's Decision – The Arbitrator's decision on this issue is clarified such that the parties are ordered to incorporate Socket's language in the interconnection agreement.

Issue 33 – How should the interconnection define "Local Interconnection Traffic"?

Petitioner (Socket) – Socket proposes the following language: 1.75 "Local Interconnection Traffic" shall mean for purposes of this Article, (i) Section 251(b)(5) Traffic, (ii) ISP Traffic, (iii) Transit Traffic, (iv) FX traffic (v) non-PIC'd IntraLATA Toll Traffic.

Respondent (CenturyTel) – CenturyTel proposes the following language: "Local Interconnection Traffic" shall mean for purposes of this Article, (i) Section 251(b)(5) Traffic, (ii) ISP-Bound Traffic, and (iii) non-PIC'd IntraLATA Toll Traffic.

Commission's Decision – The Commission finds CenturyTel's definition of local interconnection traffic most consistent with the intent of the ISP Remand Order.

Issue 34 – Which Party's definition of "Virtual NXX Traffic" is most appropriate?

Petitioner (Socket) – Socket proposes the following language: 1.132 Virtual NXX Traffic (VNXX Traffic) – As used in this Agreement, Virtual NXX Traffic or VNXX Traffic is defined as calls to or from a retail customer that uses a telephone number with an NXX Code (as set forth in the LERG) associated with a Rate Center that is different than the number and Rate Center the customer would received from a wireline carrier using the customer's residence or place of business.

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Respondent (CenturyTel) – CenturyTel proposes the following language:
 1.132 Virtual NXX Traffic (VNXX Traffic) – As used in this Agreement, Virtual NXX Traffic or VNXX Traffic is defined as calls in which a Party's Customer is assigned a telephone number with an NXX Code (as set forth in the LERG) assigned to a Rate Center that is different from the Rate Center associated with the Customer's actual physical premise location.

Commission's Decision – CenturyTel's language is most clear in defining Virtual NXX traffic.

Article VI – Resale

Issue 34 – What resale rates should be included in the interconnection agreement?

Petitioner (Socket) – Socket argues that it bases its wholesale discount in the instant interconnection agreement(s) on the wholesale discount in the previous AT&T/GTE interconnection agreement. Socket argues that CenturyTel committed to “enter into agreements which have the same rates, terms, and conditions as those agreements previously negotiated with GTE” when it purchased the GTE exchanges.¹⁷

Respondent (CenturyTel) – CenturyTel argues that it has produced a cost study for the wholesale discount ratio for Spectra and CenturyTel, producing a separate wholesale discount for each company. CenturyTel's witness Buchan argues this cost study is “[c]onsistent with CenturyTel's understanding of the method utilized by GTE and previously approved by this Commission”.¹⁸ Buchan's study “utilized default avoidable cost ratios of 25% for product management and 90% for sales and product advertising expenses based on Alabama PSC Docket 25677.”¹⁹ Buchan also states that “it is [his] understanding that GTE also utilized a ratio of 90% for sales and product advertising expenses in Missouri Case No. TO-97-63.”²⁰

Commission's Decision – The Commission recognizes that CenturyTel did not simply incorporate Alabama PSC-approved ratios, but used those ratios with respect to certain components of CenturyTel's expenses. The Commission also recognizes that “the 10-year old Missouri ratio” is not applicable to CenturyTel of Missouri or Spectra Communications Group, but the costs of GTE. The Commission disagrees that CenturyTel's avoided cost discounts were fully supported since the Commission finds those ratios contain errors as noted above. As the Arbitrator noted, the GTE ratio was previously approved by this Commission so the Arbitrator's decision is affirmed.

Article VII – UNEs

Issue 13B – With respect to orders to convert other services, e.g., special access, to UNEs and vice versa, if CenturyTel has not developed an automated ordering process, should electronic service order charges nonetheless apply?

¹⁷ Kohly Direct, p. 95, line 21 – p. 96, line 1.

¹⁸ Buchan Direct, p. 25, lines 3-4

¹⁹ Buchan Direct p. 27, lines 5-6

²⁰ Buchan Direct p. 27, lines 6-8.

Petitioner (Socket) – Socket argues that to allow CenturyTel to charge a fee to pass on the costs of a manual process provides no incentive or an insufficient incentive for CenturyTel to move to electronic ordering processes.”²¹ For this one particular class of orders, Socket proposes that CenturyTel charge an “Electronic Service Order charge” that would “reflect forward looking costs using efficient processes.”²²

Respondent (CenturyTel) – CenturyTel argues that “a manual order service charge applies if the order is handled manually.”²³ Further, CenturyTel argues that it currently processes these order manually,²⁴ and it is “entitled to recover its cost of providing that service.”²⁵

Commission’s Decision – As the Commission notes, the FCC recognized that conversions were largely a billing function. The Commission agrees that CenturyTel is entitled to recover costs associated with conversions; however, the FCC also recognized that many of the costs associated with conversions were already recovered through other charges. TELRIC principles require the Commission to order a rate that recognizes a forward-looking, efficient network. The Commission finds that labeling the charge an “electronic” service charge for a manual conversion may be a misnomer. The Commission agrees with the Arbitrator that Socket’s language is preferable, but orders the parties to refer to the charge as “conversion charge”, not “electronic service order charge” to more accurately reflect the intent of the charge.

Issue 22 – How should the parties handle UNE requests that CenturyTel can not provide without expanding its facilities?

Petitioner (Socket) – Socket argues that to best serve its customers, it needs to know the reason why CenturyTel states it cannot provision a UNE. If the answer is “no facilities”, then Socket argues that CenturyTel should “submit a construction plan with a time line for adding capacity.”²⁶ Socket also argues that both parties should share the costs of this construction plan.

Respondent (CenturyTel) – CenturyTel argues that it has agreed to provide Socket a “reasonably detailed”²⁷ explanation whenever CenturyTel asserts it cannot provide a requested UNE. While CenturyTel argues it is willing to work with Socket with regard to a construction plan, Socket “must bear the cost of the engineering and construction of additional capacity specifically to meet Socket’s needs.”²⁸

²¹ Kohly Direct, p. 100 lines 16-18.

²² Kohly rebuttal, p. 88, line 25 to p. 89, line 1.

²³ P. Hankins Direct, p. 22, line 10.

²⁴ P. Hankins Direct, p 22, line 17.

²⁵ P. Hankins Direct, p. 22, line 21.

²⁶ Kohly Direct, p. 102, lines 13-14.

²⁷ Busbee Direct, p. 8, line 6.

²⁸ Busbee Direct, p. 10, line 17-19.

Commission's Decision – As the Arbitrator's decision notes, in Case No. TO-2001-455, the Commission found that “for the nonrecurring costs of constructing the interconnection, a 50/50 split is most equitable because both parties, and their customers, will benefit from the interconnection.” The Commission affirms this decision. CenturyTel asks the Commission to clarify that the 50/50 split only applies when facilities are constructed to meet the demands of both parties and that CenturyTel is not required to incur any costs for facilities constructed solely for Socket's use or solely to meet Socket's demand. As previously stated, a 50/50 split is most equitable because both parties, and their customers, benefit from interconnection. As long as CenturyTel customers have the ability to contact Socket customers, or use a Socket customer as their Internet service provider, CenturyTel customers receive a benefit. To the extent that CenturyTel can unequivocally establish that CenturyTel customers receive absolutely no benefit from the construction, Socket would bear the entire cost of that construction.

Issue 35 – Should Article VII, Section 7.10.1 include a provision that, consistent with the FCC's rules, imposes a cap of 10 on the number of unbundled DS1 dedicated transport circuits Socket may obtain on each route where DS1 dedicated transport is available on an unbundled basis?

Petitioner (Socket) – Socket argues that under paragraph 128 of the FCC's TRRO, the cap of 10 unbundled DS1 circuits is relevant for transport routes where only DS1 transport is eligible to be unbundled (that is, where DS3 transport is not unbundled).²⁹ Socket argues that the Commission's ruling in the SBC M2A successor agreement arbitration between AT&T and then-SBC is consistent with its position in this case.³⁰

Respondent (CenturyTel) – CenturyTel argues that its language tracks precisely with the applicable DS1 transport cap rule, 47 C.F.R. §51.319(e)(2)(ii)(B), which states that the 10 DS1 transport circuit cap applies “on each route where DS1 transport is available on an unbundled basis.”³¹ CenturyTel further argues that to accept Socket's language would mean that Socket would be “entitled to an unlimited number of DS1 dedicated transport circuits between CenturyTel's wire centers.”³²

Commission's Decision – CenturyTel's language, with the exception of the reference to the “DS1 Threshold” mirrors the cap on DS1 transport found in 47 C.F.R. 51.319(e)(2)(ii)(B). CenturyTel's language is accepted.

Article VIIA – UNE Pricing

Issue 1 – What UNE rates should be included in the ICA?

Petitioner (Socket) – Socket argues that the non-recurring rates it proposes are based on the rates resulting from the Commission's recent M2A successor agreement arbitration. Socket argues, in contrast, that the rates that CenturyTel

²⁹ Kohly Direct, p. 105, line 37 to p. 106, line 2.

³⁰ Kohly Direct, p/ 109, lines 1-3.

³¹ Busbee Direct, p.11, lines 6-10.

³² Busbee Rebuttal, p. 17, lines 16-18.

proposes are: (1) different from the rates CenturyTel agreed to honor from the Commission's AT&T/GTE Arbitration;³³ and (2) not supported by any of CenturyTel's 19 submitted cost studies.³⁴ Socket also argues that in order to comply with past Commission decisions and FCC rules, it seeks deaveraging of DS1 and DS3 loop rates.³⁵

Respondent (CenturyTel) – CenturyTel argues that its proposed recurring charges for DS1 and DS3 loop rates are based on cost studies that are CenturyTel-specific, forward-looking and TELRIC compliant.³⁶ Furthermore, CenturyTel argues that their cost studies are based on engineering design and network assumptions that 'are reasonable and forward-looking.'³⁷

Commission's Decision (recurring rates) – CenturyTel argues that the 2 wire/4 wire rates are not TELRIC compliant since the parties agreed upon these rates. However, the Commission reviewed and approved these rates as TELRIC-compliant in the GTE arbitration (Case No. TO-97-63). Just because the rates are "agreed upon" in this proceeding does not mean they are not TELRIC compliant. Therefore, the Commission agrees with the Arbitrator's decision directing CenturyTel to rerun the cost studies. The Arbitrator's Report may have caused confusion because it referred to the 2-wire/4-wire costs as both "costs" and "rates". (Arbitrator's Report, pg. 50). The correct instruction begins at the bottom of page 49 through the top of page 50 where the Arbitrator directs CenturyTel to rerun its cost studies "using the agreed upon 2-Wire and 4-Wire Analog Loop costs in its DS1 and DS3 loop cost studies." Socket recognized this discrepancy and ran similar cost studies using the 2-wire/4-wire costs for the DS1 loop cost study. The correction resulted in higher rates than contained in CenturyTel's compliance filing (see CenturyTel's Response to Arbitrator's Order Directing Filing, paragraph 9, filed June 5, 2006 and Socket's Comments, page 37). The Commission directs the parties to incorporate Socket's DS1 loop rates in the interconnection agreement.

The parties also attempted to rerun the DS3 loop cost studies. The Commission finds that neither party's rerun DS3 loop cost studies are reasonable and supported by the record as TELRIC-compliant. Therefore, the Commission orders the parties to incorporate the DS3 rates from Case No. TO-2005-0336 as the only DS3 rates deemed TELRIC-compliant by this Commission.

Commission Decision (non-recurring rates) – It was not clear from the parties' discussions and testimony that non-recurring charges were still a disputed issue. CenturyTel proposes "GTE-based UNE NRCs contained in Commission-approved interconnection agreements with other CLECs. Socket proposes the NRCs from the M2A-successor arbitration (Case No. TO-2005-0336). Since the GTE-based rates were not arbitrated, but negotiated, this Commission has not made a determination that those rates are TELRIC based rates.

³³ Turner Direct p. 47, lines 16-18.

³⁴ Turner Direct, p 48, lines 22-23.

³⁵ Turner Direct, p. 58, lines 6-10.

³⁶ Buchan Direct, p 10, lines 15-21.

³⁷ David Direct, p. 4, lines 4-8.

Further, it is clear from the record that CenturyTel is not sure what non-recurring rates would apply (Transcript 0351-0355) to what situations. The Commission reviewed and approved the rates in Case No. TO-2005-0336 as TELRIC-compliant rates. The Commission finds in favor of Socket and directs the parties to incorporate those rates into this interconnection agreement.

Article IX – Maintenance

Issue 1 – How should maintenance matters be communicated between the parties?

Petitioner (Socket) – Socket argues that its proposed Maintenance article is derived in large part from the Maintenance attachment that the Commission approved as reasonable and appropriate in Case No. TO-2005-0336, except that Socket has modified that attachment to reflect changes between CenturyTel's operations and those of SBC Missouri. Socket argues that these terms should be memorialized in the interconnection agreement, rather than left to CenturyTel to dictate unilaterally to Socket in a separate "guide." Socket further argues that this agreement is a contract between two parties and under general contract law, one party can not unilaterally amend the terms under which the parties operate by changes to a separate document that results in a change to the underlying contract.³⁸

Respondent (CenturyTel) – CenturyTel argues that not only does Socket demand performance beyond CenturyTel's legal obligation, its language would impose undue burdens that are in some respects not technically feasible, and are both onerous and expensive. CenturyTel argues that its obligation is to provide Socket nondiscriminatory, parity-based treatment, but certain Socket requirements would afford Socket superior treatment as compared to CenturyTel's treatment of its own orders for retail service (or the order of other CLECs).³⁹

Commission's Decision – The Arbitrator determined that Socket may contact CenturyTel in order to discuss scheduled activities that may impact Socket customers, specifically when Socket has a customer with a service problem. The Arbitrator also determined CenturyTel should not be required to furnish Socket with all emergency outages and that Socket's definition of "Emergency Network Outage" is not acceptable, specifically when an abnormal service condition is defined in Chapter 3.

The Commission affirms the Arbitrator's decision on these two components of the issue. However, Socket states that the Arbitrator only addressed a portion of the issue. The Commission will address the remaining issues.

Missed repair commitments – Socket should be aware that one of its customer's commitments is in jeopardy. Nothing in the agreement prevents Socket from contacting CenturyTel for an update as to whether Socket will be able to meet the service commitment it has made to the customer. Any concerns socket may have with CenturyTel hampering its ability to meet service commitment objectives should be covered in Article XV – Performance Measures.

³⁸ Bruemmer Direct at p.3-5 and Rebuttal.

³⁹ Scott Direct, p 3-10, and Rebuttal.

Planned outages – CenturyTel shall comply with the requirements of 47 C.F.R. 51.325 through 47 C.F.R. 51.335 as applicable which address notification requirement for planned network changes that may result in a service outage.

The Commission approves CenturyTel's language in sections 4.1, 5.1 and 7.3. The parties are directed to include language in the interconnection agreement that accurately reflects the requirements of 47 C.F.R. 51.325 through 47 C.F.R. 51.335.

Issue 2 – What method should Socket use to contact CenturyTel with service-related questions

The Arbitrator's Report appears to have addressed part of this issue in response to Article IX - Issue 1. As the Arbitrator's decision notes, the record establishes that CenturyTel has provided Socket with a means of contacting CenturyTel for service-related questions without sitting in a queue with retail customers. This includes an option to by-pass the retail options. Since this is not the optimal solution, the Arbitrator's decision directed CenturyTel to have a knowledgeable person available to respond to Socket's questions without requiring CenturyTel to assign an individual or team specifically to Socket. The Commission affirms the Arbitrator's decision and approves CenturyTel's language at sections 5.1.1 and 7.1. The Commission directs the parties to include language in the interconnection agreement that acknowledges the Commission's directive that CenturyTel have a knowledgeable person available to respond to Socket's questions.

Article XII – Number Portability

Issue 2 – How should remote call forwarding be addressed in the interconnection agreement?

Petitioner (Socket) – Socket argues that there is no legal or policy reason why telephone numbers associated with Remote Call Forwarding (RCF) service cannot be ported as part of LNP. Porting of RCF numbers is technically feasible, and it is common in the industry to provide for number portability of remote call forwarded numbers if the incumbent is offering the same service to its customers, as is the case here. Socket further argues that the LNP subcommittee of the North American Numbering Council found that number portability for this type of arrangement is entirely reasonable and ILECs across the country indicate they routinely provide this type of number porting. Therefore, Socket's proposed language is reasonable and should be approved.⁴⁰

Respondent (CenturyTel) – CenturyTel argues that the unequivocal dictate of prevailing precedent mandates rejection of Socket's proposed language. By demanding "number portability" for numbers subject to RCF, Socket effectively demands location portability, which is inappropriate. CenturyTel argues that while parties are entitled to number portability, they are not entitled to port numbers to different location that are not in the same rate center.⁴¹

Commission's Decision – Section 251(b) of the Telecommunications Act requires local exchange carriers to provide local number portability, to the extent

⁴⁰ Turner Direct, p. 60-62 and Rebuttal.

⁴¹ Miller Direct p. 79-87 and Rebuttal.

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that it is technically feasible. The intent is that the customer will retain existing telecommunications numbers without impairment of quality, reliability or convenience when switching from one provider to another.

In this issue, the CenturyTel customer already has a remote call forwarding situation. If Socket wins that customer, the customer should continue to receive the same service capabilities it received from CenturyTel, thus the number that is remote call forwarded will also be ported to Socket if the customer desires to retain this capability. As the Arbitrator notes, location portability is defined as the ability of an end user to retain the same number as she/he moves from one physical location to another. In this situation, the customer is not moving, but the numbers are moving from a CenturyTel switch to a Socket switch as intended by local number portability.

CenturyTel points to ATIS/OBF-LSR-099 as establishing industry standards that recognize this scenario as location portability. The Commission does not have access to this document, and thus cannot make a determination of its applicability.

The Commission affirms the Arbitrator's decision with the following clarifications. First, on page 53 of the Arbitrator's Report, the Arbitrator states, Socket will be responsible for paying any intrastate or interstate charges. This language will be changed to read "The parties will be responsible for paying any applicable intrastate or interstate charges." Second, at the hearing (Transcript 0514, lines 12-16), Socket proposed to add language such that its proposal will read, "Each party shall permit telephone numbers associated with remote call forwarding to be ported *provided that the local calling scope of the ported number does not change.*" The Commission orders the parties to include the additional, italicized language in the interconnection agreement. Third, the decision on this issue relates only to those CenturyTel customers with remote call forwarding capabilities at the time the customer switches service to Socket. Fourth, for rating of outbound calls from the remote call forwarded number, the number will continue to be geographically assigned to the rate center associated with that call and access charges will apply, as applicable.

Article XIII – OSS

Issue 1 – Should the interconnection agreement contain an Article addressing Operations Support System issues?

Petitioner (Socket) – Socket argues that it is entitled to efficient and effective provisioning of wholesale facilities under CenturyTel's Section 251 obligations. Socket proposes that CenturyTel have an electronic OSS in place within nine months of the Commission's order in this arbitration and that the OSS language be derived in large part from the OSS attachment that the Commission approved as reasonable and appropriate in Case No. TO-2005-0366, as modified, to reflect changes between CenturyTel's operations and those of SBC. Socket argues that these terms be memorialized in the interconnection agreement, rather than left to CenturyTel to dictate unilaterally to Socket.⁴²

⁴² Turner Direct, p. 60-62 and Rebuttal.

Respondent (CenturyTel) – CenturyTel argues that Socket demands that CenturyTel implement electronic access to its OSS of the kind maintained by the RBOCs, including a “Real Time Electronic Interface.” CenturyTel argues that current CLEC order volume does not justify the imposition of such an onerous requirement. CenturyTel further argues that it would cost millions, or tens of millions, of dollars to radically change its entire operation’s organizational structure to implement Socket’s request.⁴³

Commission’s Decision – The parties request clarification on several components of the Arbitrator’s decision on this issue. The Commission affirms the Arbitrator’s decision on this issue with the following clarifications.

(1) As the Arbitrator’s Report clearly states, CenturyTel is not required to provide “real-time” updates or extensive system overhauls.

(2) As the Arbitrator’s Report clearly states, the parties are to incorporate language in the interconnection agreement that acknowledges CenturyTel will provide electronic notification as agreed upon in other Articles without simply referencing that Article.

(3) As the Arbitrator’s Report clearly states, the parties are directed to develop a process and incorporate language in the interconnection agreement that allows for the electronic information to be incorporated in CenturyTel systems without the need for manual intervention. The Commission is not mandating a specific process to obtain such functionality. Since no “real time” updates or extensive overhauls are required, this process could be as simple as a “cut and paste” function. The goal is to increase efficiencies and the accuracy of wholesale transactions.

(4) Does the Arbitrator’s decision order require CenturyTel to offer “selectable-list fields”? This should be a simple modification and would further reduce inaccuracies. However, without knowing the exact electronic processes the parties will develop, the Commission cannot provide specifics on how to implement such a requirement. For instance, if the parties continue e-mailing forms, either party could modify the existing form to include drop down boxes. If the form is access via the web, CenturyTel could easily add drop down boxes to various fields to reduce the possibility of errors. The Commission will direct the parties to incorporate drop down list boxes in their electronic solutions.

(5) Should ASRs be allowed through a web-based system? The Commission finds that manual ordering processes should only occur in very limited circumstances. Therefore, CenturyTel is directed to accept electronic ASRs. Consistent with the decisions above, this requirement may be addressed through either a web-based system or through e-mail, but manual intervention should be eliminated.

(6) Should CLECs have access to CSRs? The Commission agrees that CLECs are entitled to access to CSRs. However, based on CenturyTel’s testimony, it appears that meeting this requirement would require extensive overhaul to CenturyTel’s systems to provide interaction between multiple systems. Although CenturyTel will not be required to provide access to CSRs, CenturyTel is directed to review its processes and improve efficiencies such that Socket is provided

⁴³ Wilkes Direct, p. 3-4 and p. 6-20. Moreau Direct, p. 8-10.

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accurate and thorough CSR data in a timely manner. The parties are also encouraged to make CLEC access to CSRs a priority for future OSS functionality.

CenturyTel is directed to comply with the requirements of this issue within 90 days of the effective date of this order. The parties are encouraged to work diligently and cooperatively to achieve additional OSS functionality. If either party feels the other party is hampering this collaborative process that party is free to file a proceeding with this Commission seeking assistance. Finally, much like the Arbitrator, the Commission acknowledges that CenturyTel is entitled to recover its costs associated with any OSS system. Since the Commission did not order CenturyTel to implement the OSS system that Socket requests, the Commission does not offer an opinion as to the costs CenturyTel presented in this case related to OSS. Any costs associated with OSS implementation will be properly reviewed at such time as those costs are determined and submitted to this Commission.

Article XV: Performance Measures and Provisioning Intervals

Issues 1-5 – Should Article XV provide for performance measures and remedies?

Petitioner (Socket) – Socket argues that it is entitled to interconnection that is at least equal in quality to that provided by CenturyTel to itself and any other interconnecting party. Article XV lays out expectations concerning CenturyTel's provision of quality wholesale service to Socket, so that Socket in turn may provide quality, timely service to its customers. Socket urges the Commission to order the parties to hold a collaborative process to work out the details of the performance measures.⁴⁴

Respondent (CenturyTel) – CenturyTel argues that Socket is demanding that the Commission impose performance measures and a remedy plan far in excess of that which would reasonably conform to any conceivable risk that CenturyTel will fail to perform in its obligations under the agreement. CenturyTel argues that it has offered a reasonable set of performance measures to satisfy Socket that the standards of the contract will be upheld.⁴⁵

Commission's Decision – Yes. In its Triennial Review Order the FCC stated at paragraph 456 as follows:

Operational Criteria. In order to rebut the Commission's finding of no impairment as it relates to operational barriers, the states must examine whether operational factors are impairing competitors, according to our impairment standard discussed above. In particular, state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs. We believe, based on the large record in this proceeding, that

⁴⁴ Kohly Rebuttal, p. 113-122, 126; Kohly Direct, p. 111-112; Turner Direct, p. 3-9.

⁴⁵ Moreau Direct, p 18-27, Rebuttal, p. 3 and Direct Schedule D; P. Hankins Rebuttal.

these factors can raise barriers to entry. We lack, however, sufficient specific evidence concerning whether and where they will be significant enough to constitute impairment. We therefore ask state commissions to consider evidence, which could include performance metrics and standards for BOCs or other types of evidence for non-BOC incumbent LECs, of whether these factors are impairing entrants in the enterprise market, and whether unbundling will overcome this impairment.

Continuing at paragraph 489, the FCC stated:

Specifically, state commissions may require that incumbent LECs comply with an average completion interval metric, including any further disaggregation of existing loop performance metrics (i.e., quality or maintenance and repair metrics), for provisioning high volumes of loops.”

The FCC has established framework for the Commission to direct the parties to establish performance metrics. Contrary to CenturyTel's claims, it only follows that to make such performance metrics effective, remedies need to be established and enforced.

The Commission finds that neither party's Performance Measure proposal is reasonable in its entirety. The Commission supports the Arbitrator's decision to combine the parties' proposals to develop performance measures to be incorporated in the interconnection agreement.

Section 1.0 – There is no disputed language.

Section 1.1 – CenturyTel's language contains an expectation that CLECs will bear the costs for developing and implementing new business processes. This issue was decided in Article XIII - OSS. Therefore, CenturyTel's language is not appropriate and shall be rejected.

Section 1.2 – The Triennial Review Order contemplates performance measures being applicable to incumbent local exchange carriers. CenturyTel's language extends this obligation to Socket. Socket's language references other measures in the Agreement. There does not appear to be a requirement for PMs to also apply to CLECs. The Commission has already determined that cross-references will not be allowed for disputed language since both parties object to cross-references in various issues and Articles. Socket's language is more appropriate with the references in bold removed.

Section 1.2.1 – The language that CenturyTel offers as this subsection to 1.2 is already addressed in Section 1.2 and is not necessary. Socket offers no language under this separately numerated section.

Section 1.3 – There is no disputed language.

Section 1.3.1 – There is no disputed language.

Section 1.3.2 – Despite the differences in the proposed language that CenturyTel offers, the only apparent difference in the language offered by the parties is the phrases “received by CenturyTel”, submitted by CenturyTel, and the phrase “Submitted by Socket”, submitted by Socket. Since the time stated is expressed

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as “received”, CenturyTel’s language is most consistent with other provisions in the agreement.

Section 1.3.3 – In CenturyTel’s language, “Good Faith” is a subjective term that is not defined and not agreed upon. Further, if something is “inconclusive”, it can not be measured by Socket. Therefore, CenturyTel’s language is rejected.

Section 2.0 – In other Articles, CenturyTel objected and the Arbitrator agreed that CenturyTel would not be required to designate a team coordinator. Socket’s language is most appropriate to this decision.

Section 2.1 – The only distinction between the parties’ language is discussed under Section 2.0. See discussion under Section 2.0.

Section 2.2 – The only distinction between the parties; language is discussed under Section 2.0. See discussion under Section 2.0.

Section 3.0 – The only disputed language appears to be “one or more” versus “a” particular performance measure and “15” versus “20” business days. CenturyTel’s language is acceptable with the removal of the phrase “is requested” since the agreed upon language already implies a gap closure plan will be requested.

Section 3.1 – Socket’s language provides definite guidelines so it is the appropriate language to be included in the interconnection agreement.

Section 3.1.1 – The issue statement is too broad to rule on either party’s position. CenturyTel is responsible for its own performance. Socket should not be required to propose steps, processes and/or methodology for correcting CenturyTel’s performance. Therefore, Socket’s language is most appropriate.

Sections 3.1.2 and 3.1.3 – There is no disputed language.

Section 3.1.4 – Socket’s language is most appropriate since it includes definite standards.

Section 3.1.5 – There is no disputed language.

Section 3.2 – Socket’s language is most appropriate since it has timetables for all tasks and involves both parties approving the plan. Socket’s language also provides more of an incentive not to reach this stage of the performance measurement process.

Sections 3.3, 3.4 and 4.0 – There is no disputed language.

Section 4.1 – Socket’s proposed dollar amounts provide an incentive for CenturyTel to operate efficiently and without imposing barriers to entry for competitors. Socket’s “30 day” language provides a definitive timetable and is appropriate. CenturyTel’s language that penalties shall be in the form of a credit or direct payment is acceptable, but the method of payment shall be at Socket’s discretion.

Sections 4.2, 4.3, 4.3.1, 4.3.2, and 4.3.3 – These Sections are addressed in Section 4.1

Section 4.4 – CenturyTel’s language is agreed upon language except it is also made applicable to Socket. Consistent with the Arbitrator’s decision in Section 1.2, the reference to Socket shall be removed. Socket’s language includes cross-references that the Commission has already determined will not be included when disputed.

Section 4.5 – CenturyTel’s language is unnecessary, because “parity” will be dealt with in language for specific PM sections.

Section 4.5.1 – Without specifics as to the length of a “transition period”, CenturyTel's language is not appropriate and should be rejected.

Section 4.5.2 – CenturyTel's language is not appropriate. Its performance should be acceptable regardless of the number of orders received. CenturyTel claims that Socket only submits a small number of orders when it is to CenturyTel's advantage, but then claims Socket's position is not appropriate in other sections because the interconnection agreement is adoptable by other CLECs, thus expanding CenturyTel's obligations beyond its dealings with just Socket. Therefore, the Commission directs both parties to come up with language that will allow for a statistically significant sample to be determined over a period of months without referencing or considering the “small” amount of orders currently processed.

Section 4.6 – The requirement for forecasts was determined in Article V. This Performance Measure does not accurately reflect that decision and will be rejected.

Sections 4.6.1, 4.6.2 and 4.6.3 – Addressed in Section 4.6

Section 4.7 – CenturyTel's language is not appropriate. Terms of the PMs have been addressed in other sections.

Issue 7 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Prompt Transmission of Manually Requested Customer Services Record (CSR) – Retail?

Petitioner (Socket) – Socket argues that access to CSR is essential to a CLEC's ability to compete and is a key aspect of ILEC performance. Performance Measures, in this area, will apply as long as CenturyTel has no electronic OSS as it is a flag that action needs to be taken to improve the service that Socket is receiving.⁴⁶

Respondent (CenturyTel) – CenturyTel argues that this benchmark is inappropriate since Socket can show few, if any, instances where CenturyTel fails to meet its obligations under the existing contract. Further, the CSR information is from several different systems and interpreted by CenturyTel prior to being sent to Socket; an extremely time-consuming process. Finally, CenturyTel argues that staffing is based on historical factors and any significant increase in activity will affect its ability to meet a benchmark.⁴⁷

Commission's Decision – Consistent with the Commission's decision in Article XIII – OSS, CenturyTel must modify its systems/processes in such a way that there is little to no delay between Socket's “submission” and CenturyTel's “receipt” of an order. Waiving charges does not provide sufficient incentive to improve performance. The Commission finds Socket's language most appropriate. However, section 3.2 (agreed to by both parties) defines a business day as 9 business hours (8 am - 5 pm) the parties are directed to change “8 business hours” in Remedy Two to “9 business hours”.

Issue 8 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Erroneously Rejected Requests for CSRs?

⁴⁶ Socket's preliminary position. Final DPL Article XV.

⁴⁷ Moreau Direct, p. 28-30.

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Petitioner (Socket) – Socket states that it appears the parties agree that this measure should be included but that CenturyTel is imposing a requirement to reverse previously agreed upon language.⁴⁸

Respondent (CenturyTel) – CenturyTel argues that this benchmark should not be implemented until Socket demonstrates that CenturyTel's performance under this agreement indicates a need. CenturyTel argues that it takes its obligations under the FCC's CPNI rules seriously and that Socket should not be able to profit where CenturyTel is just complying with these rules.⁴⁹

Commission's Decision – Socket's language is acceptable. CenturyTel's "good faith basis" language is subjective and not defined. As long as CenturyTel identifies the errors that created the rejection and does not reject for inconsequential, obvious errors such as an order stating "Clark Ave." instead of "Clark Avenue", its concerns regarding this PM are frivolous.

Issue 9 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Erroneous Orders?

Petitioner (Socket) – Socket argues that CenturyTel is imposing a performance measurement on Socket without any discussion or justification. Socket states that it is inappropriate to penalize it for errors that are caused by information CenturyTel provides.⁵⁰

Respondent (CenturyTel) – CenturyTel argues that its ability to respond to Socket in a timely manner is significantly influenced upon its receipt of accurate and complete orders from Socket. CenturyTel argues that inclusion of this benchmark directly affects its ability to perform at parity and to meet the requirements of the agreement.⁵¹

Commission's Decision – CenturyTel's language is not appropriate. The Triennial Review Order anticipates PMs for incumbents. There does not appear to be a requirement for PMs to also apply to CLECs. Further Socket already has an incentive to submit orders accurately.

Issue 10 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Prompt Transmission of Electronically Requested Customer Service Record?

Petitioner (Socket) – Socket argues that it is entitled to interconnection that is at least equal in quality to that provided by CenturyTel to itself or any other interconnecting party. Article XV lays out expectations concerning CenturyTel's provision of quality wholesale service to Socket, so that Socket in turn may provide quality, timely service to its customers. Socket urges the Commission to order the parties to hold a collaborative process to work out the details of the performance measures.⁵²

⁴⁸ Kohly Rebuttal, p. 125.

⁴⁹ Moreau Direct, p. 30-33

⁵⁰ Kohly Rebuttal, p. 125-126.

⁵¹ Moreau Direct, p. 63.

⁵² Kohly Rebuttal at 113-120; Turner Direct at 3-9; Kohly Direct at 111-112; Kohly Rebuttal at 120-122, 126.

Respondent (CenturyTel) – CenturyTel argues that the benchmark is not defined by Socket and that the benchmark is unnecessary until such time as an OSS is developed and there is some CenturyTel failure that would make the PM necessary.⁵³

Commission's Decision – Socket's language is not appropriate based on the Commission's decision in Article XIII – OSS.

Issue 11 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Erroneous Manual Orders Rejected within 9 Business Hours?

Petitioner (Socket) – Socket argues that this PM is necessary because it is important that its orders for service are completed in a timely manner and not rejected in error.⁵⁴

Respondent (CenturyTel) – CenturyTel argues that any reference to “electronically submitted” be rejected unless referring to the existing web interface, that manual orders cannot be processed on a consistent schedule as proposed and that Socket could game the system by filling the system with erroneous orders.⁵⁵

Commission's Decision – This issue will be resolved using portions of each party's language: a) CenturyTel's language as far as the 9 business hour duration is most appropriate and agreed upon in other sections of the interconnection agreement. b) Socket's payment information is accepted as there is no incentive to correct errors through the waiving of expected charges.

Issue 12 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to percent Firm Order Confirmations (FOCs) Returned on Time for LSR and ASR Requests?

Petitioner (Socket) – Socket states that it appears that CenturyTel agrees to this PM; however, CenturyTel revises Socket's proposal to add exclusions that were not contemplated in the original PM and were not thoroughly reviewed, discussed and defined.⁵⁶

Respondent (CenturyTel) – CenturyTel argues that Socket has proposed a measurement that includes services that are; not provided according to the agreement, but applicable to tariffed access services; does not consider the difference between simple and complex orders; does not consider the accuracy of Socket's orders; and does not consider that orders require a manual “scrub”. CenturyTel argues its proposed standard is in parity with its practices for its retail end-users.⁵⁷

Commission's Decision – CenturyTel's language allows extra time to perform a manual scrub of the information. This requirement will be eliminated through the

⁵³ Moreau Direct at 33-34.

⁵⁴ Socket Preliminary Position. Final DPC Article XV: performance Measures and Provisioning Intervals.

⁵⁵ CenturyTel Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁵⁶ Kohly Rebuttal at 126.

⁵⁷ Moreau Direct at 36-39.

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electronic solution as directed in Article OSS. Socket's timeframe and penalty language are acceptable.

Issue 13 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to ASRs and LSRs erroneously rejected?

Petitioner (Socket) – Socket argues that this PM is appropriate if the agreement contains performance measures.⁵⁸

Respondent (CenturyTel) – CenturyTel argues there is no demonstrated need for this benchmark since no order is rejected without providing a reason. CenturyTel also argues that Socket does not define “erroneously” and does not consider the accuracy of its own orders.⁵⁹

Commission’s Decision – Socket’s language is acceptable as it defines “erroneously rejected” as “no accurately listed or identifiable errors listed on the reject notice”. As long as CenturyTel identifies the errors that created the rejection and does not reject for inconsequential, obvious errors such as an order stating “Clark Ave.” instead of “Clark Avenue”, its concerns regarding this PM are moot.

Issue 14 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Accurate Order Forecasts?

Petitioner (Socket) – Socket strongly opposes any performance measures that would apply to it; therefore, Socket argues that this measure should be rejected in total.⁶⁰

Respondent (CenturyTel) – CenturyTel is proposing a benchmark requiring that Socket submit accurate order forecasts in order for CenturyTel to accurately staff to meet the benchmarks and intervals contained in the agreement.⁶¹

Commission’s Decision – This issue was decided in Article V with respect to what is required for forecasting. Therefore, CenturyTel’s language is inappropriate and is rejected.

Issue 15 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percentage of Orders where Due Date is missed where Socket received a jeopardy notice prior to Due Date being missed?

Petitioner (Socket) – Socket argues this PM is necessary because customers expect to receive service on the date promised and Socket cannot make firm commitments to its customers if it cannot depend on CenturyTel to meet the service provisioning intervals to which the parties agreed.⁶²

⁵⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁵⁹ Moreau Direct at 40-41.

⁶⁰ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶¹ Moreau Direct at 63-64.

⁶² Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

Respondent (CenturyTel) – CenturyTel argues that this PM requires it to develop systems to capture data, track performance and demonstrate that the measurement is based on parity.⁶³

Commission's Decision – Socket claims that parity needs to be measured based on a carrier to carrier, not carrier to retail customer basis, but its language would have CenturyTel demonstrate parity based on a carrier-to-retail basis. As some requirement to provide a jeopardy notice before an install date is missed is appropriate, and CenturyTel presents no alternative, Socket's language is appropriate.

Issue 16 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Line Loss Notification returned within One Business Day of Work Completion?

Petitioner (Socket) – Socket argues that it is vital for CLECs to know as soon as possible that end users can be billed correctly and that it appears CenturyTel agrees with this PM and remedy plan.⁶⁴

Respondent (CenturyTel) – CenturyTel does not object to the benchmark provided that it is clarified that there are “nine business hours” or “one business day”. However, CenturyTel states that Socket's definition of this PM is not clear.⁶⁵

Commission's Decision – This issue will be resolved using portions of each party's proposals as follows: a) CenturyTel's definition of “a late line loss notification” is reasonable and accepted. b) As defined in section 3.2, a business day is 9 hours, not 8 hours. Socket's benchmark language is accepted, with the benchmark changed to 9 business hours.

Issue 17– Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Due Date Commitments Met?

Petitioner (Socket) – Socket argues that meeting due date commitments is critical to a CLECs' ability to provide timely, high quality service.⁶⁶

Respondent (CenturyTel) – CenturyTel argues that many of the measures associated with provisioning retail circuits are unreasonable or unlawful.⁶⁷

Commission's Decision – This issue will be resolved using portions of each party's proposal as follows: a) Socket's 90% assumption is more likely to cause CenturyTel to develop its own track system to truly prove what parity is in this case. Socket's percentage is thus accepted. b) With respect to CenturyTel's proposed additional exclusions: (i) appears to be reasonable and is accepted; (ii) does not appear to be reasonable and is not accepted. c) Socket's language regarding the remedy is the accepted remedy.

⁶³ Moreau Direct at 41-44.

⁶⁴ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶⁵ Moreau Direct at 44-45.

⁶⁶ Socket's Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶⁷ Moreau Direct at 46-49.

Issue 18 Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Average Delay Days for CenturyTel Caused Missed Due Dates?

Petitioner (Socket) – Socket argues that this PM is necessary to show how great a delay Socket and its customers are experiencing with respect to CenturyTel's provisioning of a service order.⁶⁸

Respondent (CenturyTel) – CenturyTel argues that this PM is not necessary because missed due dates have already been addressed in PM 1 and it would be required to develop systems to capture data and track performance by type of service for all Socket orders.⁶⁹

Commission's Decision – The Commission agrees with CenturyTel's analysis that this PM is already covered in PM 1.1. Therefore, Socket's language is not appropriate and will be rejected.

Issue 19 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Trouble Reports Within 30 Days of Installation?

Petitioner (Socket) – Socket argues that this measure is necessary to reveal whether the services CenturyTel provisions are working properly at the time of installation or whether trouble develops after service provisioning.⁷⁰

Respondent (CenturyTel) – CenturyTel argues that this PM suffers from Socket's small sample size/low volume order and is not necessary until Socket demonstrates there is a problem.⁷¹

Commission's Decision – This issue will be resolved using portions of each party's position as follows: a) the parties appear to agree on a 94% benchmark; b) the Commission agrees with CenturyTel that a "per DS0" benchmark is overreaching; therefore, the Commission accepts CenturyTel's language under "measurement" in section 2.3; c) the Commission adopts Socket's "Rules and Definitions" section over CenturyTel's "Rules and additional terms" section for this PM, as CenturyTel's "Exceptions" are overreaching; d) the Commission accepts Socket's remedy language, for reasons stated above.

Issue 20 Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Number Port Using Ten Digit Trigger (TDT)?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷²

⁶⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁶⁹ Moreau Direct at 49-51.

⁷⁰ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷¹ Moreau Direct at 51-53.

⁷² Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

Respondent (CenturyTel) – CenturyTel argues that this PM is unnecessary because Socket presently requests coordinated hot cuts for all ports and the times are not consistent with Article XII agreed upon language.⁷³

Commission's Decision – In Section 5.1.1.2 of Article XII – Number Portability, the parties agree to “set” the 10-digit unconditional trigger not later than “11:59 pm on the day before the scheduled date”. Socket’s PM is accepted, but the language will state, “The TDT-LNP related conversion where CenturyTel fails to set the 10-digit unconditional trigger by 11:59 p.m. on the day before the scheduled due date for the number port will occur less than 3.5% of the time.”

Issue 21 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Coordinated Hot Cuts (CHC)?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷⁴

Respondent (CenturyTel) – CenturyTel argues the PM should be limited to coordinated hot cuts where the customer experiences minimal down time and the language should be applicable to both parties since number portability is an obligation applicable to both parties.⁷⁵

Commission's Decision – The only meaningful difference in the parties’ proposals is the benchmark percentage. Socket states its percentage is based on the SBC post-M2A interconnection agreements. CenturyTel provides no basis for its benchmark. Therefore, Socket’s language is accepted since it is based on previously approved Commission benchmarks.

Issue 22 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percent Trouble Reports?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷⁶

Respondent (CenturyTel) – CenturyTel argues Socket’s proposal is inappropriate for three reasons: 1) the metric is not designed to produce a fair and accurate measurement of trouble reports; 2) the exclusions are too narrow; and 3) the remedy could result in an excessive penalty.⁷⁷

Commission's Decision – Socket’s language is accepted by the Commission. If CenturyTel is concerned that Socket’s language will include problems “beyond CenturyTel’s control”, CenturyTel is free to elect the parity measure.

Issue 23 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Percentage of Repair Commitment Met?

⁷³ Moreau Direct at 53-54.

⁷⁴ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷⁵ Moreau Direct 54-56.

⁷⁶ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷⁷ Scott Direct at 12-15.

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁷⁸

Respondent (CenturyTel) – CenturyTel argues Socket's proposal is inappropriate for three reasons: 1) the metric is not limited to repair commitments for out of service trouble; 2) the exclusions from the measured data is too narrow; 3) the remedy could result in an excessive penalty.⁷⁹

Commission's Decision – Socket's language is appropriate, see Issue 22.

Issue 24 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Mean Time to Restore Services?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁰

Respondent (CenturyTel) – CenturyTel argues that Socket's proposal is not appropriate for three reasons: 1) the metric proposes a 24-hour criterion but does not limit the application of the criterion to out of service trouble; 2) the exclusions from the measured data are too narrow; 3) the remedy could result in an excessive penalty.⁸¹

Commission's Decision – Socket proposes a 24-hour repair time based on SBC's post-M2A interconnection agreements. CenturyTel proposes no repair time, but proposes to complete repairs "at parity". Without an initial time benchmark, there is little incentive to quickly create "parity" to clear a trouble report. Therefore, the Commission accepts Socket's language. Although not an "apples-to-apples" comparison, Socket's language is also consistent with a company's retail requirements under 4 CSR 240-32.080(H)D.2.A., which requires 90 percent or more of out-of-service trouble not requiring unusual repair to be cleared within 24 hours.

Consistent with 4 CSR 240-32.080, CenturyTel's exceptions for trouble beyond CenturyTel's control (such as CPE) and subsequent trouble reports for the same access line will be accepted. However, the rest of CenturyTel's exceptions are excessive and will not be accepted.

Issue 25 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Repeat Trouble Report Rates?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸²

Respondent (CenturyTel) – CenturyTel argues that Socket's proposal is inappropriate for three reasons: 1) the measurement uses an inappropriate

⁷⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁷⁹ Scott Direct at 15-17.

⁸⁰ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸¹ Scott Direct at 17-19.

⁸² Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

assumption; 2) the exclusions are too narrow; and 3) the remedy could result in an excessive penalty.⁸³

Commission's Decision – The only meaningful difference in the parties' proposals is the benchmark percentage. Socket states its percentage is based on the SBC post-M2A Interconnection Agreement. CenturyTel provides no basis for its benchmark. Therefore, the Commission finds Socket's language is most appropriate.

Issue 26 - Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Interconnection Trunk Orders completed on Time?

Petitioner (Socket) – Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁴

Respondent (CenturyTel) – CenturyTel argues the PM is not necessary because it suffers from Socket's small sample size/low order volume and because CenturyTel has not only performed at parity for Socket, but has provided Socket with service that is superior to that it provides switched access customers.⁸⁵

Commission's Decision – This issue will be resolved using portions of each party's proposal. a) CenturyTel's definitions for this issue are accepted; b) Socket's benchmark will be accepted without the specific reference to Feature Group D; c) Socket's language for waiving non-recurring charges plus making a payment of one-month's recurring charge is acceptable since a remedy of simply waiving charges is not incentive for an efficient operation.

Issue 27 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to 911 Listings?

Petitioner (Socket) – Socket argues this PM is necessary because there is no question that accurate 911 database information is vitally important. Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁶

Respondent (CenturyTel) – CenturyTel argues the PMs are unreasonable and that Socket cannot demonstrate that CenturyTel's wholesale performance has been of a quality that would require imposition of any PMs. CenturyTel argues that its proposal accurately reflects that Socket is responsible for reviewing its own listings and if an error is identified CenturyTel will assist in correcting that error, if needed.⁸⁷

Commission's Decision – CenturyTel must establish an electronic solution as required by the Commission's decision in Article XIII - OSS. Assuming that CenturyTel is responsible for the 911 database, it is reasonable that 100% of the

⁸³ Scott Direct at 19-21.

⁸⁴ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸⁵ Moreau Direct at 57-59.

⁸⁶ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸⁷ Moreau Direct at 59-61.

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database information should match what Socket has submitted. The database shall be maintained consistent with 4 CSR 240-34.050(1)(B). The Commission finds that Socket's language is accepted.

Issue 28 – Should Article XV – Performance Measures and Provisioning Interval provide for a Performance Measure related to Directory Listings – White Pages?

Petitioner (Socket) – Socket argues that accuracy and timely entry of information in the white pages is basic to providing local voice service and is expected by end users. Socket states that it appears CenturyTel agrees with this PM if measures are to be included in the agreement.⁸⁸

Respondent (CenturyTel) – CenturyTel argues that Socket's proposal attempts to apply measures and penalties to something for which Socket is ultimately responsible. CenturyTel argues its proposal accurately reflects that Socket is responsible for reviewing its own listings, but that CenturyTel will assist in correcting the listing, if necessary.⁸⁹

Commission's Decision – CenturyTel's language does not provide for any penalty to provide accurate service to Socket in this matter. Additionally, a proper electronic solution should allow for proper directory listings. Therefore, the Commission finds Socket's language to be most appropriate.

IT IS ORDERED THAT:

1. The parties shall form an interconnection agreement that is consistent with the findings and conclusions in this Decision.
2. This order shall become effective on June 30, 2006.

Davis, Chm., Gaw, Clayton, and
 Appling, CC., concur.
 Murray, C., concurs, with separate
 concurring opinion attached.

⁸⁸ Socket Preliminary Position. Final DPL. Article XV: Performance Measures and Provisioning Intervals.

⁸⁹ Moreau Direct at 61-62.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its Order, the Commission approved the Arbitration Order establishing terms of an Interconnection Agreement between Socket Telecom, LLC ("Socket") and CenturyTel of Missouri, LLC ("CenturyTel"). In addressing when Socket would have to establish a "Point of Interconnection" ("POI") in any exchange, the Commission ruled:

"For each exchange in which there are 1000 or less CenturyTel access lines, a POI will be established in that exchange when access lines directly attributable to Socket increase to a DS1 or 24-channel threshold."

In addition, the Commission set a similar threshold for each exchange with more than 1000 CenturyTel access lines with 2.4 percent per 1,000 access lines.¹ While I believe that the Arbitration Order when taken as a whole is reasonable, I write separately to note that this provision is unreasonable and arbitrary.

The Commission used these threshold numbers in response to the parties request that the Commission further define what "technical infeasibility" means for purposes of requiring Socket to establish a new point of interconnect. These thresholds, however, were arbitrarily chosen and have no relation whatsoever to any facts that would establish that it was technically infeasible for CenturyTel to continue to interconnect with Socket through an established POI.

Pursuant to the 1996 Telecommunications Act, the Federal Communication Commission enacted in 47 C.F.R. § 51.305, which requires that an incumbent local exchange carrier ("LEC") must allow any requesting telecommunications carrier to interconnect with the incumbent LEC's network at any point in the incumbent LEC's network that is "technically feasible" that will provide the level of quality equal to what the incumbent LEC provides to itself. Further, 47 C.F.R. § 51.305(e) states that an incumbent LEC that denies a request for interconnection at a particular point must prove to its state Commission that interconnection at that point in its network is not technically feasible. The parties in this case did ask the arbitrator to define the term "technically feasible" to presumably avoid arguments in the future when CenturyTel declared that a POI was not technically feasible any longer.²

I believe, however, that setting arbitrary thresholds is not a good solution to this problem, and that the Commission simply should have continued to simply find that, "CenturyTel may require an additional POI within the LATA if CenturyTel can show to this Commission that it is technically infeasible to keep using the POI(s) already in place." This would have brought disputes between CenturyTel and Socket before the Commission to allow us to make determinations based on facts and circumstances in the record, rather than potentially imposing unnecessary burdens upon Socket.

¹ An example of the second threshold is as follows: if an exchange has 2,412 access lines, Socket would have to establish a new POI when its access lines reach approximately 2.4 DS1s or 57.6 access lines.

² CenturyTel and Socket requested clarification of the term "technically feasible"; however both offered definitions that were completely unacceptable, leaving the Commission to determine what was acceptable. We failed.

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One such burden could occur in a situation wherein Socket enters a CenturyTel market with one business customer that has 24 lines. This is a customer that could switch to another carrier easily after Socket goes to the expense of building its own POI, leaving Socket with a facility in an exchange in which it no longer has a customer. And this will be forced upon Socket even if CenturyTel has a POI that still has the technical feasibility of carrying this traffic. If such a dispute were brought before the Commission, we would have the facts to determine whether or not it was necessary to place this burden of risk on Socket. This would be a more reasonable course of action.

Finally, 47 C.F.R. 51.305 requires that CenturyTel interconnect with Socket “[a]t any technically feasible point within the incumbent LEC’s network”. Requiring Socket to build a POI exchange-by-exchange could very easily become a barrier to entry in CenturyTel’s markets. I am a strong advocate of requiring competitive telecommunications companies to build facilities, but this Commission needs to allow a reasonable basis for initially entering the market until the conditions are adequate to make building facilities cost effective to the competitor.

The Commission should use sound reason and facts to craft the provisions of an interconnection agreement. We should not try to add “clarity” when the outcome is this arbitrary and unsupported by either sound reason or facts.

**In the Matter of the Application of Kansas City Power & Light
Company for Authority to Transfer Functional Control of
Certain Transmission Assets to the Southwest Power Pool,
Inc.***

Case No. EO-2006-0142

Decided July 13, 2006

Electric §1. The Commission granted the Motion for Clarification filed by the Staff of the Missouri Public Service Commission, The Empire District Electric Company, Kansas City Power and Light Company and the Southwest Power Pool, Inc.

AMENDED ORDER APPROVING STIPULATION AND AGREEMENT

Background

On September 28, 2005, Kansas City Power & Light Company filed an application under Section 393.190.1, RSMo 2000, and Commission rule 4 CSR 240-3.110 to transfer functional control of certain transmission assets to the Southwest Power Pool, Inc. As required by Section 393.190.1, the Commission issued an Order Directing Notice of Tax Impact, wherein the Commission informed the County Clerks of Cass, Jackson, Lafayette, Carroll, Chariton and Saline Counties that the proposed transaction will have no tax impact on the revenues of their respective counties. The Commission subsequently set an intervention deadline and ordered that notice be properly given. The Commission granted intervention to Southwest Power Pool, Inc., Aquila, Inc. – Investor (Electric), Midwest Independent Transmission System Operator (MISO) and The Empire District Electric Company.

On February 24, 2006, the parties filed a Stipulation and Agreement. The signatories include: KCPL; Southwest Power Pool; Empire District Electric; the Staff of the Commission; and the Office of the Public Counsel. Although not signatories to the Agreement, Aquila filed a Notice of No Opposition and MISO filed a Waiver of Right to Hearing. No party has filed opposition to the agreement. The Staff of the Commission filed its Memorandum in Support of the Stipulation and Agreement on March 14, 2006. Thereafter, the Commission held an on-the-record presentation to better understand certain circumstances surrounding KCPL's participation in the SPP.

The Agreement

The signatories to the Stipulation and Agreement addressed the following:

- KCPL's interim and conditional participation in the SPP
- transmission service to the Missouri Bundled Retail Load – the terms and conditions of which are contained in the "Service Agreement", Attachment A, to the Stipulation and Agreement.
- SPP administrative costs
- SPP geographic scope and function

* See page 470 for another order in this case

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- joint operating agreements addressing an intrastate RTO seam
- sunset provision and effective date

The signatories agree that KCPL's participation in the SPP is "prudent and reasonable" and is "not detrimental to the public interest."

Staff's Memorandum in Support

In its Memorandum, Staff points out that the standard for approval of this type of application is that the transfer is not detrimental to the public interest. In addition to being measured in terms of dollars, this standard should also take into consideration the following:

- reliability of the interconnected power system
- public safety
- improvements or detriments to system planning
- impact on the jurisdiction of the Missouri Commission

Staff goes on to discuss each of these considerations in great detail.

Monetary Cost/benefit

With regard to a "dollar" cost/benefit analysis, Staff considers two elements: 1) the costs paid by KCPL to SPP for its administration of the RTO; and 2) the savings related to more efficient use of existing generation and transmission assets. Staff informs the Commission that the SPP contracted with Charles River Associates, International to conduct a study of the cost and benefits of the entire SPP region. That study concluded that the SPP, as an RTO, is cost beneficial for KCPL. Further, the study shows a strong indication that the net benefits to Missouri ratepayers from KCPL joining the SPP are positive. Staff does, however, point out that any lack of accuracy of the study may primarily have to do with the relative costs of fuels, concluding that higher gas costs lead to an increase in benefit but that higher coal prices would result in lower benefits.

Although the studies were the best information available at the time they were performed, Staff adds that it supports the Commission granting interim approval of KCPL's participation in the SPP. Further, the Stipulation and Agreement require an Interim Report that measures the benefits of participation. The Interim Report reviews the actual costs of participation compared to an estimate of what the costs would have been absent such participation. Additionally, if the cost of administration of non-market functions increases by more than 25% or the load of the SPP membership decreases by more than 25%, KCPL will file a pleading with the Commission to address the merits of continued participation. Finally, with regard to transmission upgrades, if any one supplemental upgrade project exceeds \$25 million, KCPL agrees to provide Staff and the OPC with a report detailing the need, costs and anticipated benefits of the upgrade.

Reliability

Staff states that reliability will be improved simply because transmission service will be provided on an integrated regional basis in which all of the physical flows are accurately taken into account. Information is faster and more accurate than if processed by a single Regional Transmission Provider. Also, with the

additional flexibility of the RTO to dispatch generation, the RTO is better able to manage congestion and thereby improve the reliability of the system.

Public Safety

KCPL will remain responsible to ensure that its bulk power systems do not threaten public safety. However, removing the responsibilities to also manage the provision of transmission service should allow KCPL to better focus on public safety issues.

System Planning

A primary benefit of regional planning is that reliable transmission service can be provided on a region-wide basis at a lower cost. One specific aspect of planning has to do with system upgrades. Although the SPP is allowed by FERC to require regional cost sharing for Base-Plan Projects, those projects must be needed in order to fix reliability issues. The Interim Report to be filed by KCPL also addresses the issue of system upgrades.

Commission Jurisdiction

KCPL, Staff and Public Counsel agree and SPP acknowledges that the Service Agreement's primary function is to ensure that the MoPSC continues to set the transmission component of KCPL's rates to service its Missouri Bundled Retail Load. The Service Agreement, however, must be approved by FERC. If changes are required and the signatories can agree on those changes, the revised Service Agreement will be provided to the Commission's Staff and OPC.

With regard to unanticipated FERC actions, KCPL, Staff and Public Counsel acknowledge that the Service Agreement is an integral part of the Stipulation and that the Service Agreement's primary function is to ensure that the MoPSC continues to set the transmission component of KCPL's rates to serve its Missouri Bundled Retail Load. Therefore, KCPL, Staff and Public Counsel agree that the MoPSC will have the right to rescind its approval of KCPL's participation in SPP and to require KCPL to timely initiate any notices, filings and actions necessary to seek withdrawal on the bases of an unanticipated FERC action that would either preclude the MoPSC's ability to set the above rates or that would have the effect of changing the Service Agreement.

Staff concludes that the parties have crafted a Stipulation and Agreement that accommodates KCPL's request, while protecting the public interest.

On-the-Record Presentation

The Commission held an on-the-record presentation on May 12, 2006. The Commissioners and the parties discussed issues having to do with the interests of both the company's customers and the general public. With regard to "full requirements" customers, the contracts under which those customers are operating would not be disturbed during the duration of the contract. Additionally, the Commission was assured that after the transfer the Commission, not the FERC, would continue to have jurisdiction over the retail rates of the company.

The Commission also discussed with the parties the consequences that would result from the company withdrawing from the SPP. Witnesses explained that the company would have to pay an exit fee that Staff deemed reasonable and

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further, that the company would have to honor its obligations with regard to new transmission expansions.

Finally, as there are two regional "power pools" in Missouri, SPP and MISO, the Commission solicited input on potential issues that may arise. The Commission was informed that these two entities can operate efficiently and in the public interest through "seams agreements." These agreements are necessary to address issues having to do with power flow and reliability.

Conclusion

The Commission has reviewed KCPL's application, the resulting Stipulation and Agreement and Staff's memorandum in support of the Stipulation and Agreement and having considered these verified pleadings, which are admitted into evidence, finds that the proposed transfer of KCPL's assets to the SPP is not detrimental to the public interest and shall be approved. Furthermore, no party objects to the Stipulation and Agreement. Therefore, under Commission rule 4 CSR 240-2.115(2)(C), the Commission will treat it as unanimous.

The Commission points out that KCPL's participation with the SPP is for an initial period of up to seven years. Further, that two years prior to the conclusion of the Interim Period, KCPL has agreed to file a pleading with the Missouri Public Service Commission regarding KCPL's continued participation. KCPL, Staff and Public Counsel acknowledge that; 1) prior to the end of the Interim Period, the MoPSC has the jurisdiction to order that KCPL's approval for participation is SPP be terminated, modified, or further conditioned; and 2) if the MoPSC rescinds its approval of KCPL's participation in SPP, it has the jurisdiction to require KCPL to timely initiate any notices, filings, and actions necessary to seek withdrawal. SPP acknowledges that there is a possibility that the Mo PSC could issue such an order to KCPL. It is with this understanding that the Commission approves the Stipulation and Agreement.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed by the signatories in this matter is approved.
2. Kansas City Power & Light Company is authorized to transfer to the Southwest Power Pool, Inc., conditional and interim functional control of certain transmission assets as identified in Appendix C attached to KCPL's application.
3. Kansas City Power & Light Company shall comply with the terms and conditions contained in the Stipulation and Agreement.
4. Kansas City Power & Light Company is authorized to comply with the Stipulation and Agreement and the attached Service Agreement.
5. Kansas City Power & Light Company is authorized to enter into, execute and perform in accordance with the terms of all other documents, not inconsistent with the Stipulation and Agreement, which may be reasonably necessary and incidental to the performance of the transaction.
6. During Kansas City Power & Light Company's transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri Public Service Commission's jurisdiction as specifically described in the Stipulation and Agreement and generally described in the body of this order.

7. This order shall become effective on July 23, 2006.
8. This case may be closed on July 24, 2006.

Davis, Chm., Murray, Gaw,
and Clayton, CC., concur.
Appling, C., absent.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of The Empire District Electric Company for Authority to Transfer Functional Control of Certain Transmission Assets to the Southwest Power Pool, Inc.*

Case No. EO-2006-0141
Decided July 13, 2006

Electric §4. The Commission issued an Order approving Stipulation and Agreement and in return the parties filed a motion of clarification requesting the Commission clarify several areas of concern in the Commission Order that were inconsistent with the stipulation and agreement.

AMENDED ORDER APPROVING STIPULATION AND AGREEMENT

Background

On September 28, 2005, The Empire District Electric Company (EDE) filed an application under Section 393.190.1, RSMo 2000, and Commission rule 4 CSR 240-3.110 to transfer functional control of certain transmission assets to the Southwest Power Pool, Inc. As required by Section 393.190.1, the Commission issued an Order Directing Notice of Tax Impact, wherein the Commission informed the County Clerks of Barry, Barton, Cedar, Christian, Dade, Dallas, Green, Hickory, Jasper, Lawrence, McDonald, Newton, Polk, St. Clair, Stone and Taney Counties that the proposed transaction will have no tax impact on the revenues of their respective counties. The Commission subsequently set an intervention deadline and ordered that notice be properly given. The Commission granted intervention to Southwest Power Pool, Inc., Aquila, Inc. – Investor (Electric), Midwest Independent Transmission System Operator (MISO) and the Kansas City Power & Light Company.

On February 24, 2006, the parties filed a Stipulation and Agreement. The signatories include: EDE; Southwest Power Pool; Kansas City Power & Light; the Staff of the Commission; and the Office of the Public Counsel. Although not signatories to the Agreement, Aquila filed a Notice of No Opposition and MISO filed

* See page 466 for another order in this case

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a Waiver of Right to Hearing. No party has filed opposition to the agreement. The Staff of the Commission filed its Memorandum in Support of the Stipulation and Agreement on March 14, 2006. Thereafter, the Commission held an on-the-record presentation to better understand certain circumstances surrounding Empire's participation in the SPP.

The Agreement

The signatories to the Stipulation and Agreement addressed the following:

- EDE's interim and conditional participation in the SPP
- transmission service to the Missouri Bundled Retail Load – the terms and conditions of which are contained in the "Service Agreement", Attachment A, to the Stipulation and Agreement.
- SPP administrative costs
- SPP geographic scope and function
- joint operating agreements addressing an intrastate RTO seam
- sunset provision and effective date

The signatories agree that EDE's interim and conditional participation in the SPP is "prudent and reasonable" and is "not detrimental to the public interest."

Staff's Memorandum in Support

In its Memorandum, Staff points out that the standard for approval of this type of application is that the transfer is not detrimental to the public interest. In addition to being measured in terms of dollars, this standard should also take into consideration the following:

- reliability of the interconnected power system
- public safety
- improvements or detriments to system planning
- impact on the jurisdiction of the Missouri Commission

Staff goes on to discuss each of these considerations in great detail.

Monetary cost/benefit

With regard to a "dollar" cost/benefit analysis, Staff considers two elements: 1) the costs paid by EDE to SPP for its administration of the RTO; and 2) the savings related to more efficient use of existing generation and transmission assets. Staff informs the Commission that the SPP contracted with Charles River Associates, International to conduct a study of the cost and benefits of the entire SPP region. That study concluded that the SPP, as an RTO, is cost beneficial for EDE. Further, the study shows a strong indication that the net benefits to Missouri ratepayers from EDE joining the SPP are positive. Staff does, however, point out that any lack of accuracy of the study may primarily have to do with the relative costs of fuels, concluding that higher gas costs lead to an increase in benefit but that higher coal prices would result in lower benefits.

Although the studies were the best information available at the time they were performed, Staff adds that it supports the Commission granting interim approval of EDE's participation in the SPP. Further, the Stipulation and Agreement require an Interim Report that measures the benefits of participation. The Interim Report reviews the actual costs of participation compared to an estimate of what the costs

would have been absent such participation. Additionally, if the cost of administration of non-market functions increases by more than 25% or the load of the SPP membership decreases by more than 25%, EDE will file a pleading with the Commission to address the merits of continued participation. Finally, with regard to transmission upgrades, if any one supplemental upgrade project exceeds \$25 million, EDE agrees to provide Staff and the OPC with a report detailing the need, costs and anticipated benefits of the upgrade.

Reliability

Staff states that reliability will be improved simply because transmission service will be provided on an integrated regional basis in which all of the physical flows are accurately taken into account. Information is faster and more accurate than if processed by a single Regional Transmission Provider. Also, with the additional flexibility of the RTO to dispatch generation, the RTO is better able to manage congestion and thereby improve the reliability of the system.

Public Safety

EDE will remain responsible to ensure that its bulk power systems do not threaten public safety. However, removing the responsibilities to also manage the provision of transmission service should allow EDE to better focus on public safety issues.

System Planning

A primary benefit of regional planning is that reliable transmission service can be provided on a region-wide basis at a lower cost. One specific aspect of planning has to do with system upgrades. Although the SPP is allowed by FERC to require regional cost sharing for Base-Plan Projects, those projects must be needed in order to fix reliability issues. The Interim Report to be filed by EDE also addresses the issue of system upgrades.

Commission Jurisdiction

Empire, Staff and Public Counsel agree and SPP acknowledges that the Service Agreement's primary function is to ensure that the MoPSC continues to set the transmission component of Empire's rates to service its Missouri Bundled Retail Load. The Service Agreement, however, must be approved by FERC. If changes are required and the signatories can agree on those changes, the revised Service Agreement will be provided to the Commission's Staff and OPC.

With regard to unanticipated FERC actions, Empire, Staff and Public Counsel acknowledge that the Service Agreement is an integral part of the Stipulation and that the Service Agreement's primary function is to ensure that the MoPSC continues to set the transmission component of Empire's rates to serve its Missouri Bundled Retail Load. Therefore, Empire, Staff and Public Counsel agree that the MoPSC will have the right to rescind its approval of Empire's participation in SPP and to require Empire to timely initiate any notices, filings and actions necessary to seek withdrawal on the bases of an unanticipated FERC action that would either preclude the MoPSC's ability to set the above rates or that would have the effect of changing the Service Agreement.

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Staff concludes that the parties have crafted a Stipulation and Agreement that accommodates EDE's request, while protecting the public interest.

On-the-Record Presentation

The Commission held an on-the-record presentation on May 12, 2006. The Commissioners and the parties discussed issues having to do with the interests of both the company's customers and the general public. With regard to "full requirements" customers, the contracts under which those customers are operating would not be disturbed during the duration of the contract. Additionally, the Commission was assured that after the transfer the Commission, not the FERC, would continue to have jurisdiction over the retail rates of the company.

The Commission also discussed with the parties the consequences that would result from the company withdrawing from the SPP. Witnesses explained that the company would have to pay an exit fee that Staff deemed reasonable and further, that the company would have to honor its obligations with regard to new transmission expansions.

Finally, as there are two regional "power pools" in Missouri, SPP and MISO, the Commission solicited input on potential issues that may arise. The Commission was informed that these two entities can operate efficiently and in the public interest through "seams agreements." These agreements are necessary to address issues having to do with power flow and reliability.

Conclusion

The Commission has reviewed EDE's application, the resulting Stipulation and Agreement, and Staff's memorandum in support of the Stipulation and Agreement and, having considered these verified pleadings, which are admitted into evidence, finds that the transfer of functional control of EDE's assets to the SPP is not detrimental to the public interest and shall be approved. Furthermore, no party objects to the Stipulation and Agreement. Therefore, under Commission rule 4 CSR 240-2.115(2)(C), the Commission will treat it as unanimous.

The Commission points out that Empire's participation with the SPP is for an initial period of up to seven years. Further, that two years prior to the conclusion of the Interim Period, Empire has agreed to file a pleading with the Missouri Public Service Commission regarding Empire's continued participation. Empire, Staff and Public Counsel acknowledge that; 1) prior to the end of the Interim Period, the MoPSC has the jurisdiction to order that Empire's approval for participation in SPP be terminated, modified, or further conditioned; and 2) if the MoPSC rescinds its approval of Empire's participation in SPP, it has the jurisdiction to require Empire to timely initiate any notices, filings, and actions necessary to seek withdrawal. SPP acknowledges that there is a possibility that the Mo PSC could issue such an order to Empire. It is with this understanding that the Commission approves the Stipulation and Agreement.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed by the signatories in this matter is approved.

2. The Empire District Electric Company is authorized to transfer to the Southwest Power Pool, Inc., conditional and interim functional control of certain transmission assets as identified in Appendix C attached to EDE's application.

3. The Empire District Electric Company shall comply with the terms and conditions contained in the Stipulation and Agreement.

4. The Empire District Electric Company is authorized to comply with the Stipulation and Agreement and the attached Service Agreement.

5. The Empire District Electric Company is authorized to enter into, execute and perform in accordance with the terms of all other documents, not inconsistent with the Stipulation and Agreement, which may be reasonable necessary and incidental to the performance of the transaction.

6. During The Empire District Electric Company's transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri Public Service Commission's jurisdiction as specifically described in the Stipulation and Agreement and generally described in the body of this order.

7. This order shall become effective on July 23, 2006.

8. This case may be closed on July 24, 2006.

Davis, Chm., Murray, Gaw,
and Clayton, CC., concur.
Appling, C., absent.

Jones, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

T-Mobile USA, Inc., Complainant, v. BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Craw-Kan Telephone Cooperative, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company, Respondents.

Case No. TC-2006-0486
Decided July 13, 2006

Telecommunicadtions §1. T-Mobile filed a complaint against the respondent rural Local Exchange Carriers (LEC) because the LEC's had notified T-Mobile that they had requested AT&T Missouri and Sprint, Missouri, Inc block all T-Mobile traffic destined to specified exchanges of the rural LEC's. The Commission issued its Order Denying Application for Rehearing and Reconsideration, but Offering Clarification in response to T-Mobile's application for rehearing and reconsideration of the Commission's Notice Regarding Obligation to Cease Blocking Preparations Pending Commission Decision. T-Mobile's application indicated that the Commissions notice characterizes T-Mobile as an "originating carrier" within the meaning of the Commissions Enhanced Record Exchange rules.

ORDER DENYING APPLICATION FOR REHEARING AND RECONSIDERATION, BUT OFFERING CLARIFICATION

On June 20, 2006, T-Mobile USA, Inc., filed a complaint with the Commission against BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Craw-Kan Telephone Cooperative, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company. The complaint alleged that the respondent companies, each a rural Local Exchange Carrier (LEC), had notified T-Mobile that they had requested that AT&T Missouri and Sprint Missouri, Inc., block all T-Mobile traffic destined to the specified exchanges of the rural LECs. The rural LECs had informed T-Mobile that they were taking this action pursuant to Commission Rule 4 CSR 240-29.130, part of the Enhanced Record Exchange rules. The blocking of T-Mobile's traffic was to begin the next day, June 21.

On June 20, in response to T-Mobile's complaint, the Commission issued a Notice Regarding Obligation to Cease Blocking Preparations Pending Commission Decision. That notice informed the Respondents of their obligation under the

Enhanced Record Exchange rules to cease preparations to block traffic when a formal complaint was filed with the Commission. The Respondents have not blocked T-Mobile's traffic.

On June 30, T-Mobile filed an application for rehearing and reconsideration of the Commission's June 20 notice. T-Mobile does not object to the substance of the Commission's notice, but does seize on a sentence in that notice that characterizes T-Mobile as an "originating carrier" within the meaning of the Commission's Enhanced Record Exchange rules. T-Mobile contends that, as a wireless carrier, licensed by the Federal Communications Commission, it is not an "originating carrier" within the meaning of the Commission's rule and, therefore, is not subject to that rule. T-Mobile is concerned that by characterizing it as an "originating carrier" in its notice, the Commission has prejudged an important issue in its complaint.

Commission Rule 4 CSR 240-2.160(2) allows for reconsideration of procedural and interlocutory *orders*. The Notice Regarding Obligation to Cease Blocking Preparations Pending Commission Decision that the Commission issued on June 20 is merely a notice informing the parties of the provisions of another Commission regulation. It does not order anyone to do anything, and does not decide any pending issue. As a *notice*, it is not a proper subject for either reconsideration or rehearing. For that reason, T-Mobile's Application for Rehearing and Reconsideration must be denied.

However, the Commission will clarify that its June 20 notice does not decide any issue regarding T-Mobile's complaint. Specifically, the Commission has not decided whether T-Mobile is an "originating carrier" within the meaning of the Commission's Enhanced Record Exchange rules.

IT IS ORDERED THAT:

1. T-Mobile USA, Inc.'s Application for Rehearing and Reconsideration is denied.
2. The Commission's Notice Regarding Obligation to Cease Blocking Preparations Pending Commission Decision is clarified as provided in the body of this order.
3. This order shall become effective on July 13, 2006.

Davis, Chm., Murray, Gaw, and Clayton, CC., concur.
Appling, C., absent.

Woodruff, Deputy Chief Regulatory Law Judge

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**In the Matter of the Application of Embarq Missouri, Inc., for
Competitive Classification Under Section 392.245.5, RSMo
2005.**

*Case No. IO-2006-0551
Decided July 20, 2006*

Telecommunications §40. Embarq filed an application for competitive classification asking that the Commission classify as competitive its residential services, other than exchange access service, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. The Commission accepted the request and changed their classification.

Appearances

Linda K. Gardner, Esq., Embarq Missouri, Inc., 6450 Sprint Parkway, Overland Park, Kansas 66251, for Embarq Missouri, Inc.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, and *David A. Meyer*, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo 2005, for residential services, other than exchange access service, for the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. In addition, the Commission approves the tariff revisions filed to implement these classifications.

Procedural History and Pending Motions

On June 29, 2006, Embarq Missouri, Inc., filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. On July 3, 2006, Embarq filed a motion requesting to amend its application by attaching a verification page to it. Section (20) of 4 CSR 240 2.080 states that any party may amend a pleading within ten days without leave of the Commission if no responsive pleading has been filed. Therefore, the amended pleading is accepted.

In its application, Embarq requested that the Commission classify as competitive its residential services, other than exchange access service, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. Concurrent with the filing of its application, Embarq filed proposed tariffs to become effective on July 31, 2006, reflecting the requested competitive classifications.

The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than July 6, 2006. No request for intervention was received.

The Commission also directed that any objections or recommendations from the Office of the Public Counsel or any other interested party be filed no later than July 10, 2006. On July 11, 2006, the Public Counsel filed its objections and a request to be allowed to file the pleading one day out of time due to technical difficulties. The Commission hereby grants the motion.

Staff filed its recommendation on July 10, 2006. As part of its recommendation, Staff filed affidavits from various wireless carriers and a facilities-based carrier. Those affidavits provided information about customers being served in the relevant exchanges. Staff recommended that Embarq's application be granted.

The Commission held a hearing on July 18, 2006. Staff, Embarq, and Public Counsel were represented at the hearing. The parties were given the opportunity to give closing arguments at the hearing in lieu of briefs. The Commission heard testimony from Staff's witnesses, Walt Cecil and Jon Van Eschen, and from Embarq's witness, John Idoux.

On July 19, 2006, Staff moved to supplement the record in order to clarify its recommendation and the testimony of John Van Eschen. Staff's motion shall be granted.

Overview

Embarq is a large incumbent local exchange carrier (ILEC) that became subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten-days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

On July 14, 2005, Senate Bill No. 237¹ (S.B. 237) was signed into law and became effective August 28, 2005. S.B. 237 changed the process under the price cap statute² for determining whether the business and residential services of a price cap regulated ILEC should be classified as competitive in an exchange.

¹ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), codified at Section 392.245, RSMo Cum. Supp. 2005.

² Section 392.245, RSMo.

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Before S.B. 237, the Commission was required to determine that “effective competition” existed for the requested services in the designated exchanges before classifying those services as competitive. Under this “effective competition” standard, the Commission reviewed, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

Under S.B. 237, however, the Commission no longer determines whether “effective competition” exists. Rather, S.B. 237 focuses on the number of carriers providing “basic local telecommunications service” within an exchange. The Commission must classify the ILEC’s services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.³

The statute provides that one commercial mobile radio service (CMRS) provider can be counted as an entity providing basic local telecommunications services.⁴ The other entity that can be counted as providing basic local telecommunications services is one that provides “local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest.”⁵ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services.

Embarq’s application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for residential services in five exchanges.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Embarq is a “local exchange telecommunications company” and a “public utility,” and is authorized to provide “telecommunications service” within the state of Missouri as each of those phrases is defined in Section 386.020. Embarq is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245.

Embarq requested that the Commission classify the residential services, except for exchange access, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges as competitive. In support of this request, Embarq filed its verified application including maps of the service territory of wireless

³ Section 392.245.5, RSMo.

⁴ Section 392.245.5(1), RSMo.

⁵ Section 392.245.5(2), RSMo.

carriers in the relevant exchanges.⁶ Embarq also alleged that Comcast, through its Comcast Digital Voice® affiliate, is offering local phone service to residential customers and that Embarq has “experienced customer loss” in the subject exchanges as a result. Embarq cited to Comcast’s website www.comcast.com for further information. In addition, Embarq filed proposed tariff sheets.⁷ Embarq’s witness, John Idoux, also appeared and testified at the hearing in support of the amended application.

Staff provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. Walt Cecil and John Van Eschen of the Commission’s Telecommunications Department testified in support of the application at the hearing. According to Staff’s recommendation, all of the exchanges for which Embarq requests competitive status have at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to at least two residential customers with addresses within the exchange. In addition, according to Staff the wireless and wireline companies have the ability to provide local numbers to those customers.

Comcast Phone of Missouri, L.L.C., is a company certificated by the Commission to provide basic local telecommunications services. Its affiliate, Comcast Digital Voice, a non-certificated entity, is providing voice over internet protocol (VoIP) services to two or more customers in the subject exchanges. Comcast Digital Voice uses facilities owned by itself and/or its affiliates to provide local service from the customer premise to the “head end” (similar to a central office). Comcast Phone provides Comcast Digital Voice with telephone numbers, collects and pays access and collects and pays Universal Service Fund and relay surcharges for Comcast Digital Voice. A Comcast company also owns an IP-based switch with all the functionality of a traditional Class 5 switch.

Attached to Staff’s recommendation were the affidavits of John G. Sullivan, Vice President of Comcast Phone of Missouri, LLC, d/b/a Comcast Digital Phone,⁸ Kenneth A. Schiffman, Director, State Regulatory, Sprint Nextel Corporation,⁹ Lawrence J. Krajci, Staff Manager of External Affairs of Alltel Communications, Inc.,¹⁰ and Teri Y. Ohta, Corporate Counsel, on behalf of T-Mobile Central, LLC.¹¹

The affidavits of the wireless carriers indicated that there were at least two wireless residential customers in each exchange. Alltel stated that it has at least two customers in the Oak Grove, Odessa, and Pleasant Hill exchanges. T-Mobile indicated that it has at least two customers in the Oak Grove and Odessa exchanges. Neither Alltel nor T-Mobile can identify its customers as residential or business. Sprint, however, stated that it had at least two residential customers residing at addresses in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.

⁶ Exhibit A.

⁷ Exhibit B.

⁸ Attachment 1.

⁹ Attachment 2.

¹⁰ Attachment 3.

¹¹ Attachment 4.

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Staff also stated in its recommendation that Embarq had provided it with local exchange routing guide (LERG) information indicating that local numbering resources are available in the five exchanges and that numbering assignments have been made to at least one of the wireless companies. The LERG information also indicated that the certificated Comcast company had received numbering assignments. In addition, each of these exchanges is part of the Kansas City Metropolitan Calling Area (MCA).

The Commission finds that the facts as submitted in the verified application, the verified Staff Recommendation, including the affidavits of competing carriers and the hearing testimony are reliable and support the grant of competitive classification in the requested exchanges. Based on that information, the Commission finds that Comcast is providing facilities-based local voice service to residential customers in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. In addition, the Commission finds that there is at least one non-affiliated CMRS carrier providing service to residential customers in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo, as amended in 2005 by S.B. 237, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Embarq is an incumbent local exchange telecommunications company and has requested competitive classification of its business or residential services in several exchanges.

Section 392.245.5, RSMo, as amended in 2005 by SB 237, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access

service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."¹² The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.¹³

S.B. 237 defines "local voice service" as meaning "[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo."¹⁴

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."¹⁵

Embarq is asserting that its services in various exchanges should be classified as competitive. As the party asserting the positive of a proposition, Embarq has the burden of proving that proposition.¹⁶

DECISION

The undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated entity providing "local voice" service, in whole or in part, over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for each of these exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that Embarq's application for competitive classification of its residential services, other than exchange access services, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges should be granted.

¹² Section 392.245.5(1).

¹³ Section 392.245.5(2).

¹⁴ Section 392.245.5(3).

¹⁵ Section 386.020(52).

¹⁶ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

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As required by the statute, Embarq submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of July 31, 2006. Since the submitted tariff complies with the Commission's decision, that tariff is approved.

IT IS ORDERED THAT:

1. The verified application as amended on July 3, 2006, by Embarq Missouri, Inc., is accepted.
2. The Office of the Public Counsel's Request for Leave to File Out of Time is granted.
3. The Motion to Supplement the Record filed by the Staff of the Missouri Public Service Commission on July 19, 2006, is granted.
4. Embarq Missouri, Inc.'s residential services, other than exchange access service, are classified as competitive in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.
5. Embarq Missouri, Inc.'s proposed tariff revisions (Tracking No. YI-2007-0002) filed on June 29, 2006, are approved to become effective for service on or after July 31, 2006.
6. All other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.
7. This Report and Order shall become effective July 28, 2006.

Davis, Chm., and Clayton, C., concur;
Gaw, C., concurs, with separate
concurring opinion to follow;
and certify compliance with the
provisions of Section 536.080, RSMo.
Murray and Appling, CC., absent.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

This Commissioner continues to have concerns that the telecommunications legislation passed in 2005 does not provide adequate protections to ensure that telecommunications rates will be just and reasonable. The threshold for competitive status under S.B. 237 eliminated the ability of the Commission to weigh factors including market share of competitors in an exchange in question in determining whether adequate competition exists to control prices. The recent rate hikes by AT&T of Missouri of basic local service and other services less than a year after receiving competitive status under the new act only increases this concern.

The case before this Commission, according to the evidence presented by the parties, meets the low threshold established by the new act therefore I concur in the decision.

**Petition of Socket Telecom, LLC for Compulsory Arbitration of
Interconnection Agreements with CenturyTel of Missouri,
LLC and Spectra Communications, LLC, Pursuant to Sec-
tion 251(b)(1) of the Telecommunications Act of 1996.***

Case No. TO-2006-0299

Decided July 27, 2006

Telecommunications §46.1. Socket Telecom, LLC filed a petition for arbitration with the Commission asking the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group, LLC. The Commission determined that these companies should form an interconnection agreement consistent with the Report and Order.

**NOTICE REGARDING MOTION FOR RECONSIDERATION
AND NOTICE OF CLARIFICATION**

Background

On June 28, 2006, Socket Telecom, LLC filed a motion for reconsideration of the Commission's decision in this matter on the threshold for the establishment of additional points of interconnection (POIs). Socket states that the "criteria used in the Decision are different from the criteria related to POIs in any other interconnection agreement of which Socket is aware." Socket also emphasizes that the Federal Communications Commission's rules require incumbent local exchange companies to interconnect with competitive local exchange companies at any technically feasible point. CenturyTel of Missouri, LLC responded to Socket's motion on June 29.

CenturyTel states that the Commission has developed language that does not reflect either party's position but is a middle ground that it is willing to adopt. CenturyTel urges the Commission to reject Socket's motion.

Motion for Reconsideration

This Arbitration process is governed by Federal Law.¹ These rules do not include reconsideration as a remedy for aggrieved parties. Further, a request for reconsideration is not necessary for review of the Commission's decision. At 252(e)(6):

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

* See pages 349 and 482 for other orders in this case.

¹ 47 U.S.C §252.

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In light of federal law, the Commission finds that it is unnecessary to rule on the motion for reconsideration. However, the Commission will clarify its decision with regard to thresholds for the establishment of additional points of interconnection.

Notice of Clarification

The Telecommunications Act allows a state Commission to reject an arbitrated interconnection agreement if the state Commission:

finds that the agreement does not meet the requirements of section 251 of [title 47], including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251 of [title 47] or the standards set forth in subsection (d) of this section.²

In compliance with this standard, and in response to Socket's request for more guidance on this issue, the Commission established the following methodology for the establishment of additional POIs:

1. For each exchange in which there are 1,000 or less CenturyTel access lines, a POI will be established in that exchange when access lines directly attributable to Socket increase to a DS1 or 24-channel threshold.
2. For each exchange in which there are more than 1,000 CenturyTel access lines, the parties will apply a threshold of 2.4 percent per 1,000 access lines. In other words, if an exchange has 2,412 access lines, a new POI will be established when Socket's access lines reach the level of approximately 2.4 DS1s.
3. These thresholds apply to access lines attributable to Socket.
4. If the parties have a dispute as to the number of CenturyTel access lines in an exchange, the Commission Staff will assist in this dispute. If a dispute continues regarding the number of CenturyTel access lines in an exchange, either party can file seeking resolution from the Commission without following the normal dispute resolution process in the interconnection agreement.

To better state and clarify the above language, the Commission restates the above language as follows:

1. For each exchange in which there are 1000 or fewer CenturyTel access lines, a point of interconnection (POI) will be established when traffic to/from that existing POI exceeds

² 47 U.S.C. §252(e)(2)(B).

a DS1 or 24-channel threshold at peak over three consecutive months in that exchange.

2. For each exchange in which there are more than 1000 CenturyTel access lines, the parties will apply a threshold of 2.4 percent per 1000 access lines to determine the threshold by which traffic to/from the existing POI must exceed at peak over three consecutive months. In other words, if an exchange has 2412 access lines, a new POI will be established when traffic to/from the existing POI exceeds the level of approximately 2.4 DS1s in that exchange.

3. If the parties have a dispute as to the number of CenturyTel access lines in an exchange, the Staff of the Commission will assist. If the dispute persists, either party may seek resolution from the Commission without following the normal dispute resolution process in the interconnection agreement.

Davis, Chm., Gaw, and Clayton,
CC., concur.
Murray, C., concurs, with separate
concurring opinion attached.
Appling, C., abstains.

Jones, Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its Order, the Commission approved a clarification of its Arbitration Order regarding the threshold that would require Socket Telecom, LLC ("Socket") to establish new "Point of Interconnection" ("POI") in any exchange. While I believe the clarification is an improvement upon the original language in the Arbitration Order in that it focuses on the amount of traffic rather than the number of access lines, I still believe that it is arbitrary and I object for the reasons set forth in my Concurrence to the Arbitration Order.

While I continue to believe that the Arbitration Order when taken as a whole is reasonable, I again write separately to note that this provision is an unreasonable and arbitrary threshold that fails to comport with the 1996 Telecommunications Act.

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**Staff of the Public Service Commission of the State of Missouri,
Complainant, v. New Florence Telephone Company, Re-
spondent.**

*Case No. TC-2006-0184
Decided July 27, 2006*

Rates §77, Telecommunications §33. The Commission approved the Stipulation and Agreement between the Staff of the Commission, Office of Public Counsel, and New Florence Telephone Company which purports to resolve concerns about over-earning by New Florence. The terms of this order and the stipulation and agreement provide a financial penalty that cannot be recovered from the ratepayers of the company.

ORDER APPROVING STIPULATION AND AGREEMENT

The Staff of the Commission filed a complaint against New Florence Telephone Company on October 24, 2005. In that complaint, Staff sought authority from the Commission to seek penalties in circuit court against New Florence for violations of law by the company. On June 2, 2006, Staff, the Office of the Public Counsel, and New Florence filed a stipulation and agreement that would resolve all contested issues related to the complaint. Two of the indirect owners of New Florence, Robert D. Williams and Local Exchange Company, LLC, also signed the stipulation and agreement. Staff filed suggestions in support of the stipulation and agreement on June 7.

Because the stipulation and agreement purports to resolve concerns about over-earning by New Florence, the Commission, on June 12, ordered that notice of the filing of the stipulation and agreement be given to the general public and to potentially interested parties. June 28 was established as the deadline for filing applications to intervene. No applications to intervene were filed.

Staff's complaint against New Florence contains eleven counts:

Count I alleged that LEC, LLC, one of the owners of New Florence, charged New Florence fees for administrative services that exceeded the costs it incurred to provide those services;

Count II alleged that LEC, LLC, overcharged New Florence for management consulting services as part of a scheme to inflate New Florence's costs to obtain an overall revenue increase from federal Universal Service Fund support payments and National Exchange Carriers Association, Inc. settlements;

Count III alleged that South Holt Communications, Inc., a company owned by Robert Williams, another owner of New Florence, overcharged New Florence for management consulting services as part of a scheme to inflate New Florence's costs to obtain an overall revenue increase from federal Universal Service Fund support payments and National Exchange Carriers Association, Inc. settlements;

Count IV alleged that Matzco, a company owned by Kenneth M. Matzdorff, a member of LEC, LLC, and thus an owner of New Florence, overcharged New Florence for management consulting services as part of a scheme to inflate New Florence's costs to obtain an overall revenue increase from federal Universal

Service Fund support payments and National Exchange Carriers Association, Inc. settlements;

Count V alleged that New Florence improperly recorded the cost of a newly purchased switch at an inflated cost of \$584,000, when an affiliate of New Florence had actually purchased the switch at a cost of \$183,754;

Count VI alleged that New Florence recorded false entries in its accounts related to charges for administrative services allegedly provided by LEC, LLC;

Count VII alleged that New Florence recorded false entries in its accounts related to charges for management services allegedly provided by LEC, LLC;

Count VIII alleged that New Florence recorded false entries in its accounts related to charges for management services allegedly provided by South Holt Communications, Inc.;

Count IX alleged that New Florence recorded false entries in its accounts related to charges for management services allegedly provided by Matzco, LLC;

Count X alleged that New Florence recorded false entries in its accounts related to acquisition of a switch; and

Count XI alleged that New Florence recorded false entries in its accounts related to loans made to Robert D. Williams and Kenneth M. Matzdorff.

In the stipulation and agreement, New Florence agrees to make a payment to the Public School Fund in the amount of \$100,000 in settlement of the matters alleged in Staff's complaint and in all other potential complaints that might arise out of Staff's investigation into the affairs of New Florence. In addition, if New Florence has not arranged its sale to new, independent, owners by October 2, 2006, it will be obligated to pay an additional \$250,000 to the Public School Fund by October 3.

The stipulation and agreement also provides that Staff will recommend to the Commission that New Florence, or its new owners, be certified for receipt of federal Universal Service Fund disbursements, if Staff finds that the company's management is independent, has no relationship or ties to current owners and has sufficient knowledge and skill to be acceptable to Staff. The stipulation and agreement further provides that New Florence will adjust its books and records to correct inaccuracies.

In addition, to address concerns about overearning by the company, the stipulation and agreement requires New Florence, or its successor, to issue a credit of \$50 per access line to each customer of New Florence on December 29, 2006. The stipulation and agreement would also institute a two-year rate moratorium measured from the closing date of the sale of the company, or December 29, 2006, whichever occurs first.

Finally, New Florence agrees that neither it, nor any successor company will seek competitive classification or price cap status until after the Commission has conducted a rate case regarding New Florence's basic local telecommunications service rates.

The Commission held an on-the-record presentation regarding the proposed settlement on July 6. At that proceeding, the Commission questioned the signatory parties about the details of the stipulation and agreement.

After reviewing the stipulation and agreement, and considering the testimony offered at the on-the-record presentation, the Commission finds that the stipulation

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and agreement should be approved as a resolution of Staff's complaint. The Commission, however, notes that Mr. Robert Williams, an indirect owner, officer, and consultant for New Florence, provided extensive testimony before the Commission regarding the operations of New Florence, the allegations in the complaint, the services of his consulting company and his personal services for New Florence. The Commission emphasizes that the release language found in paragraph III.H of the stipulation and agreement does not release Robert Williams, or any other witness, from liability for having offered false testimony before the Commission.

IT IS ORDERED THAT:

1. The stipulation and agreement filed on June 2, 2006, is approved, and the signatory parties are ordered to comply with its terms.
2. None of the financial penalty imposed on New Florence Telephone Company by terms of this order and the stipulation and agreement shall ever be recovered from the ratepayers of the company.
3. This order shall become effective on August 6, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

**In the Matter of an Investigation of Union Electric Company d/
b/a AmerenUE's Storm Preparation and Restoration Efforts
in Eastern Missouri.**

Case No. EO-2007-0037

Decided July 27, 2006

Electric §1. The Commission led a formal investigation of Union Electric Company d/b/a AmerenUE regarding the effectiveness of the storm restoration efforts in Eastern Missouri. The report was required to have been filed by August 7, 2006.

**ORDER DIRECTING STAFF TO INVESTIGATE UNION ELECTRIC
COMPANY D/B/A AMERENUE AND SETTING
INTERVENTION DEADLINE**

As hundreds of thousands of households and businesses were without electricity for a prolonged period of time in the aftermath of storms on July 19 and July 21, 2006, the Commission hereby directs the Staff of the Commission to conduct a formal investigation of Union Electric Company d/b/a AmerenUE and any other regulated utilities whose activities have an impact on storm restoration efforts, including but not limited to AT&T and Missouri American Water Company, concerning the effectiveness of its storm preparation and restoration efforts in Eastern Missouri.

The Commission hereby directs the Staff to conduct such investigation expeditiously and authorizes it to take any appropriate action, including filing a complaint against AmerenUE or other regulated utility in a separate case, if it determines such action is appropriate. By directing the initiation of this investigation, the Commission does not prejudge any issues, but determines only that the matter shall be investigated. Moreover, this case shall not constitute a contested case. Any attempt to seek sanctions or take other action affecting the rights or obligations of AmerenUE or any other regulated utility shall be made in a separate case.

Proper parties should be given notice and an opportunity to intervene in this matter. The Information Office of the Commission shall send notice to the members of the General Assembly who represent counties within the affected areas, as well as such city and county officials of St. Louis and Potosi and St. Louis, St. Charles, Jefferson, Washington, Iron, Franklin, and St. Francois Counties as the public information office it deems appropriate to notify. The Information Office of the Commission shall also notify the newspapers, as listed in the newspaper directory of the current *Official Manual of the State of Missouri*, that serve such areas.

The Data Center of the Commission shall provide notice of this order to the county commissions of St. Louis, St. Charles, Jefferson, Washington, Iron, Franklin, and St. Francois Counties and the Board of Aldermen of the City of St. Louis. Proper persons wishing to intervene shall file an application to intervene with:

Secretary of the Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

and:

The Office of the Public Counsel
P.O. Box 2230
Jefferson City, Missouri 65102

As this matter is expedited, the response time for data request objections is shortened to five days and responses to ten days.

IT IS ORDERED THAT:

1. The Staff of the Commission is directed to begin a formal investigation of Union Electric Company d/b/a AmerenUE and any other regulated utilities whose activities have an impact on storm restoration efforts, including but not limited to AT&T and Missouri American Water Company and is authorized to take appropriate action, as described above, however such action or complaint shall be filed in a separate, contested case.
2. The Staff of the Commission shall file an investigation report no later than August 27, 2006.
3. Any interested party wishing to intervene in this case shall file an application to do so as directed herein no later than August 7, 2006.
4. The Data Center and Information Office of the Missouri Public Service Commission shall provide notice as set out herein.
5. This order shall become effective on July 27, 2006.

Davis, Chm. and Appling, C., concur;
Gaw and Clayton, CC., concur with
separate opinions to follow;
Murray, C., dissents with opinion to follow.

Dale, Chief Regulatory Law Judge

**CONCURRING OPINION OF COMMISSIONERS
ROBERT M. CLAYTON III AND STEVE GAW**

We concur in the Order opening an investigation into the devastating impact of a natural disaster that occurred on July 19, 2006, in the St. Louis Metropolitan area. Media reports have highlighted the power outages, water shortages and communication difficulties stemming from severe thunderstorms, high winds and other severe weather conditions. As of today, eight days have passed since the storm and 36,500 AmerenUE customers continue to suffer without modern day neces-

sities. Hundreds of thousands of citizens have gone without electricity, air-conditioning, refrigeration, televisions, internet and cooking equipment. Losing electricity poses life-threatening conditions to many people, especially those who are dependant on medical equipment. Nine people have died in the aftermath of the storm and extreme heat.

Commission personnel have been involved in emergency response to a limited extent by helping coordinate resources and observing utility response to the disaster. It is critically important that this Commission assess the strength and durability of each of the utility systems in place, critically analyzing the impact of the storm and the quality of utility responses.

As the Commission begins this assessment, it is important to note several items. First, this investigation should not interfere with any ongoing efforts to restore service to customers. The first priority is to restore safe and adequate service before making detailed inquiries. Second, there is no question that the St. Louis Metropolitan area suffered from a horrific storm with 80 mph winds, strong gusting rains and damaging hail. No level of preparation or governmental direction can completely prevent power outages. Third, there is no question that utility personnel have worked tirelessly and at great sacrifice to restore the necessities of modern day life. An AmerenUE employee has made the ultimate sacrifice in doing his job.

In light of these three observations, this Commission must examine where, why and how things went wrong. According to reports, communication between utilities and their customers appear to have been far from adequate. Service outages were not reported efficiently and internet notification failed. 36,500 customers in the affected region continue to demand relief from stifling heat due to lack of electricity. Other utilities experienced difficulties as well. Missouri-American Water instituted a boil order during the first day when many customers lacked electricity to boil water. Disputes arose between Ameren and AT&T on communications disruptions.

Staff has supplied a general list of items to be assessed, analyzed and critiqued. This Commission must play a leading role in finding the weak points in the infrastructure and be aggressive in addressing how we can best prepare for future Missouri weather disasters. We would add to Staff's list the following:

- 1) Analysis of the age, siting, durability and quality of Ameren's infrastructure, including the placement of distribution lines;
- 2) A comprehensive compliance review of Commission Orders stemming from prior storms and outages;
- 3) An analysis of all assistance requested or offered and whether Ameren accepted or denied the offers of assistance by other entities;
- 4) An evaluation of the communication, cooperation and assistance between the affected utilities, citizens and city, county and state officials;
- 5) An analysis of why the St. Louis Metropolitan area has suffered through three straight summers of significant power outages when no other U.S. city has faced the same challenges;
- 6) An assessment of the coordination of the efforts to ensure that critical operations facilities such as hospitals, residential care facilities, police and fire department buildings had temporary electric needs satisfied until service from the grid could be restored;

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7) An assessment of the interdependence among all Missouri certificated utilities in the affected area; and

8) Any and all recommendations to improve utility response.

This investigation should be prompt but thoroughly conducted to ensure an accurate, timely response for improving utility performance. The information obtained should remain public so all customers and rate payers affected by the outages can monitor the damage and response.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Yesterday, the Commission ordered Staff to begin a formal, docketed investigation of Union Electric Company, d/b/a AmerenUE's storm preparation and restoration efforts following two major storms in Eastern Missouri on July 19 and July 21, 2006. The Commission also authorized Staff to investigate AT&T Missouri and Missouri-American Water Company on the same basis, as well as "any other regulated utilities whose activities have an impact on storm restoration efforts". Finally, the Commission authorized Staff to file a complaint against any regulated utility that Staff finds appropriate grounds for such complaint following the investigation. I dissent from the Commission's Order because I believe it is overbroad and that it is an unnecessary process when Staff has already committed to conducting an investigation under its own discretion with regular reports to the Commission.

First, I object to the Commission's Order because it is far reaching, vague and overbroad when it names "any other regulated utilities whose activities have an impact on storm restoration efforts". These utilities remain unnamed and existing regulated utilities in Eastern Missouri, of which there are many, can only guess whether or not the Commission means to include them in this dubious investigation. The Commission should be more precise in opening this type of formal investigation and should have named any utility it was investigating in the same manner as it named AmerenUE, AT&T and Missouri-American Water Company.

In any major storm that creates damage causing large outages, the Commission Staff takes the time to investigate the affected utility's performance, both in preparing for the disaster and in responding to the disaster after it occurs. These investigations are extensive; reviewing everything from web page performance to general service issues, such as tree-trimming, that may have affected how the storm damage occurred. Devastating storm damage is not new to Missouri.¹ In each of the last 3 years, AmerenUE has suffered extensive damage from wind storms resulting from "super cells" in the Greater St. Louis area and Eastern Missouri. In 2002, an ice storm hit the western half of Missouri causing extensive

¹ The Concurring Opinion filed by Commissioners Clayton and Gaw demands an investigation into the suspicious circumstances surrounding their allegation that "St. Louis has suffered from significant power outages for three straight summers, unlike any other U.S. city". Are these Commissioners concerned that Mother Nature has some dubious plot to reap havoc on the citizens of St. Louis and that we should and could do something about it? Have they missed the outages suffered by New York City, New Orleans, and numerous cities on the Gulf Coast that repeatedly have been hit by hurricanes over the last three years?

damage and outages in the service areas of three different electric utilities. Following each event, Commission Staff conducted a thorough investigation resulting in a report to the Commission with recommendations where utility improvement was needed. These investigations were not opened in formal, docketed cases; but were informal investigations that better allowed staff and the utilities to exchange data and discuss issues.

Why now is the Commission ordering a formal investigation docket when in reality it is completely unnecessary? I can only speculate that the gravity of this event has touched off a public and political maelstrom of criticism of AmerenUE and other utilities. The Commission, however, does not have to respond by worrying about the political expediency of opening a formal investigation to show the public that we are doing something. All we really need do is let the public know that we are conducting an extensive review in our traditional manner, without creating a case that is nothing more than a political gesture. If AmerenUE, or any other utility, did something it should not have, or did not do something it should have, Staff would file a complaint and pursue the appropriate remedy without this docket. Further, if there are private citizens with specific grievances in this matter, we have a simple process for the public to file complaints.

Prior to the Commission's Order, Staff had prepared a preliminary list of items to be investigated with regard to AmerenUE in the traditional, informal investigation process.² There is no reason to believe that Staff needed an order from the Commission to continue with its expert and thorough process of examining all issues and making recommendations for improvement where warranted. Nor is there any reason to believe that Staff would hesitate to file a complaint against AmerenUE or any other Missouri-regulated utility.

The instigation of a formal investigation will only resolve the murmurings of those who are second-guessing the Commission's response to this event. I do not believe that that is a sufficient reason to initiate this process.

Attachment

Review of AmerenUE Storm Restoration Effort (Outline)

- Storms / Arrival Times / Outages by Day - Morning & Evening (w/maps)
- Crew Needs Determination
 - Mutual Assistance Agreements
 - Search for Outside Crews
 - When Crews Called In
 - Any Delays in Crew Availability/Arrivals
 - How Long Crews Were Kept
- Outage Tracking & Field Dispatch Coordination
- Prioritization of Outage Repairs

² I have attached the preliminary list put together by members of the Commission's staff to illustrate how thorough Staff is and how ahead of the issue they already are. If Staff had failed to include some issue that any Commissioner wanted reviewed in the informal process, then all that Commissioner would have needed to do was contact Staff and tell them to include it.

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- Priority Treatment Groups (fire, medical, police, water, sewer, etc...)
- Prioritization of Remaining Customers
- Call Center Operations During Storm
 - Customers Calling In To Report Outages (Telco Problems?)
 - Overflow Provisions
 - Automated Call Back Functions
 - "You should receive service by X O'Clock"
 - "You should have service on in your area at this time"
- Internet Linkage Problems Early On
- Consumer Services Specific Issues/Observations
- Medical Needs Customer Registration and Notifications
- Contact w/City Officials & Agencies
- Vegetation Management
 - Status of Trimming, Still on Track?
 - Any Need to Accelerate Trim Schedule?
 - Any Need to Consider Additional Programs?
 - Any Special Contracts/Initiatives
 - Years for Transmission vs. Distribution
 - Service Lines in Yards
 - Types of Trees & Clearance Distances
 - Replacement of Problem Trees / Incentives (Ornamentals)
- Grid Reliability Standards Issues & Infrastructure Maintenance
- Evaluation of Restoration Effort & Recommendations

In the Matter of the Application of Hickory Hills Water & Sewer Co., Inc., the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel for Approval of Their Unanimous Stipulation and Consent Order for Appointment of Interim Receiver and Order to General Counsel to Petition the Circuit Court of Cole County for the Appointment of a Receiver.*

*Case No. WO-2007-0036
Decided August 3, 2006*

Public Utility §5. Because Hickory Hills is a public utility as defined by Section 386.020(42), RSMo 2000, and as a public utility, they were required to provide safe and adequate service to their customers. The Commission determined that they were not able to do so, and therefore there was a clear and immediate need for the appointment of a receiver to take charge of Hickory Hills.

Public Utility §7. Hickory Hills was a public utility as defined by Section 386.020(42), RSMo 2000. They were also classified as both a sewer and a water corporation and were subject to the Commission's jurisdiction. The Commission determined that there was a clear and immediate need for the appointment of a receiver to take charge of Hickory Hills to ensure that its customers received safe and adequate sewer service.

Water §4. The General Counsel of the Commission was directed to seek a finding from the Circuit Court of Cole County that control of and responsibility for Hickory Hills Water and Sewer Co., Inc., should not, in the best interest of the company's customers, be returned to the owners of the company and that the receiver should be directed to transfer by sale or liquidate the assets of the company in the manner provided by law.

Sewer §4. The General Counsel of the Commission was directed to seek a finding from the Circuit Court of Cole County that control of and responsibility for Hickory Hills Water and Sewer Co., Inc., should not, in the best interest of the company's customers, be returned to the owners of the company and that the receiver should be directed to transfer by sale or liquidate the assets of the company in the manner provided by law.

**ORDER APPROVING UNANIMOUS STIPULATION
AND CONSENT ORDER**

Syllabus: This order approves the Unanimous Stipulation and Consent Order for Appointment of Interim Receiver and Order to General Counsel to Petition the Circuit Court of Cole County for the Appointment of a Receiver. This order also directs the Commission's Staff to file a petition in circuit court seeking the appointment of a receiver to take charge of the water and sewer system of Hickory Hills Water & Sewer Co., Inc., and appoints an interim receiver to immediately take charge of that system while Staff's action is pending in the circuit court.

* This order contains a correction issued by the Commission in an August 15, 2006 order.

PROCEDURAL HISTORY

On July 25, 2006, the Staff of the Missouri Public Service Commission, the Office of the Public Counsel, and Hickory Hills Water & Sewer Co., Inc., filed a Unanimous Stipulation and Consent Order for Appointment of Interim Receiver and Order to General Counsel to Petition the Circuit Court of Cole County for the Appointment of a Receiver ("Unanimous Stipulation and Consent Order"). That filing resulted in the Commission opening this case to review the Unanimous Stipulation and Consent Order. A copy of the Unanimous Stipulation and Consent Order is attached to this order as Attachment A.

The Missouri Public Service Commission conducted an on-the-record presentation in this case on July 31, 2006, to address Commission questions regarding the Unanimous Stipulation and Consent Order for Appointment of Interim Receiver and Order to General Counsel to Petition the Circuit Court of Cole County for the Appointment of a Receiver. Mr. Randy Clifford, owner of Hickory Hills, submitted an affidavit into the record that stated he was aware of his right to a hearing in this case and waived that right. He also restated his support for the Unanimous Stipulation and Consent Order and reaffirmed the statements made in his affidavit attached thereto as Exhibit G.

The representative from the Office of the Public Counsel was unable to participate in the on-the-record presentation due to an unanticipated injury. Accordingly, the Commissioners' questions for the Public Counsel could not be answered during the on the record presentation. On July 31, 2006, the Commission issued an order requiring the Public Counsel to file written answers to the questions listed in that order no later than Tuesday, August 1, 2006. The Public Counsel timely filed its Response to the Questions of the Commission ("Public Counsel's Response").

STIPULATED AGREEMENT

The Unanimous Stipulation and Consent Order, to which Mr. Randy Clifford was a signatory, states that Mr. Clifford, the sole owner, officer, and director of Hickory Hills, is unable or unwilling to continue to provide safe and adequate service to the customers of Hickory Hills. The Unanimous Stipulation and Consent Order asks the Commission to order its General Counsel to petition the Circuit Court of Cole County for an order attaching the assets of Hickory Hills in the manner provided by law, and appoint an interim receiver for the company as authorized under Section 393.145., RSMo Supp. 2005. The parties jointly recommend appointment of Gary Cover of Clinton, Missouri as interim receiver for the company, and state that Mr. Cover is a responsible person knowledgeable in the operations of utilities.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Hickory Hills is a public utility as defined by Section 386.020(42), RSMo 2000. Furthermore, Hickory Hills is a sewer corporation and a water corporation, as those terms are defined in Subsections 386.020(48) and (58), RSMo 2000. As such,

Hickory Hills is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Subsection 393.145.1, RSMo Supp. 2005, provides as follows:

If, after hearing, the commission determines that any sewer or water corporation that regularly provides service to eight thousand or fewer customer connections is unable or unwilling to provide safe and adequate service, has been actually or effectively abandoned by its owners, or has defaulted on a bond, note or loan issued or guaranteed by any department, office, commission, board, authority or other unit of state government, the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver. The venue in such cases shall, at the option of the commission, be in the circuit court of Cole County or in the circuit court of the county in which the utility company has its principal place of business.

Furthermore, Subsection 393.145.2, RSMo Supp. 2005, provides as follows:

If the Commission orders its general counsel to petition the circuit court for the appointment of a receiver under subsection 1 of this section, it may in the same order appoint an interim receiver for the sewer or water corporation. The interim receiver shall have the authority generally granted to a receiver under subsection 6 of this section, except that the commission cannot authorize the interim receiver to transfer by sale or liquidate the assets of the utility. The interim receiver shall be compensated in an amount to be determined by the commission. The interim receiver shall serve until a judgment on a petition for writ of review of the commission's order, if any, is final and unappealable, and until the circuit court thereafter determines under subsection 5 of this section whether to grant the commission's petition for appointment of receiver.

In addition, Subsection 393.145.3, RSMo Supp. 2005, provides as follows:

When the commission files its petition for appointment of receiver in the circuit court, it shall attach to its petition an official copy of its determination under subsection 1 of this section. The commission shall not file such action until its determination under subsection 1 of this section is final and unappealable.

Subsection 393.145.7, RSMo Supp. 2005, provides as follows:

Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interests of its customers, be returned to the owners. However, if the commission or other interested party petitions and the court determines, after hearing, that control of and responsibility for the utility should

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not, in the best interests of its customers, be returned to the owners the court shall direct the receiver to transfer by sale or liquidate the assets of the utility in the manner provided by law.

Subsection 393.145.5, RSMo Supp. 2005, requires that a receiver appointed under that section be "a responsible person, partnership, or corporation knowledgeable in the operation of utilities."

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case.¹ Furthermore, Section 536.090, RSMo Supp. 2005, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.² Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the stipulation and agreement.

DECISION

The Commission has reviewed the Unanimous Stipulation and Consent Order, the transcript of the on-the-record presentation, Mr. Clifford's affidavit, and Public Counsel's Response. Based on the agreement of the parties and the explanations received in Public Counsel's Response and the on-the-record presentation, the Commission believes that the parties have reached a just and reasonable settlement.

There is a clear and immediate need for the appointment of a receiver to take charge of Hickory Hills to ensure that its customers are able to receive safe and adequate water and sewer service. There is also a need for the appointment of an interim receiver to take immediate control of the operation of this water and sewer system. The person identified and recommended by Staff to serve as interim receiver is a responsible person knowledgeable in the operation of utilities, and will be appointed as interim receiver.

It is also clear that the best interests of the customers dictate that control of the water and sewer system should not be left to Mr. Clifford and Hickory Hills. Therefore, Staff will be authorized to seek a finding from the circuit court that control of and responsibility for Hickory Hills should not be returned to its current owner. Instead, Staff will be directed to seek an order from the circuit court directing the receiver to proceed to transfer by sale or liquidate the assets of the company.

The Unanimous Stipulation and Consent Order, as well as Subsection 393.145.2, RSMo Supp. 2005, state that the Commission shall determine the compensation to be paid to the interim receiver. The Commission does not believe there is sufficient evidence in the record to determine what would constitute reasonable compensation for Mr. Cover's duties as interim receiver. The Commission believes time is of the essence in this case and does not want to delay this proceeding unnecessarily. Accordingly, the Commission will order its Staff to

¹ Section 536.060, RSMo Supp. 2005.

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

submit a proposed compensation agreement for consideration, and the Commission will make its determination on this issue in a subsequent order.

IT IS ORDERED THAT:

1. The General Counsel of the Commission is directed to petition the Circuit Court of Cole County for an order attaching the assets of Hickory Hills Water & Sewer Co., Inc., and placing that company under the control and responsibility of a receiver.
2. The General Counsel of the Commission is directed to seek a finding from the Circuit Court of Cole County that control of and responsibility for Hickory Hills Water & Sewer Co., Inc., should not, in the best interest of the company's customers, be returned to the owners of the company and that the receiver should be directed to transfer by sale or liquidate the assets of the company in the manner provided by law.
3. Gary Cover of Clinton, Missouri is appointed as interim receiver for Hickory Hills Water & Sewer Co., Inc. As interim receiver, Mr. Cover shall operate the Company so as to preserve the assets of the Company and to serve the best interests of its customers, pursuant to the law.
4. The Commission Staff will file with the Commission a proposed compensation agreement for Mr. Cover's services as interim receiver on or before August 18, 2006.
5. This order shall become effective on August 13, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Voss, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of Tariff No. 3 of Time Warner Cable Information
Services (Missouri), LLC, d/b/a Time Warner Cable.***

Case No. LT-2006-0162

Decided August 8, 2006

Telecommunications §2. Telecommunications companies are required to have schedules on file with the Commission showing their rates, rentals and charges for service of each and every kind by or over its facilities. It is also mandated that telecommunications companies list the charges for their services, which Time Warner failed to list. The charges must also be listed in US dollars which Time Warner also has failed to list.

Telecommunications §7. Time Warner is subject to the Commission's jurisdiction pursuant to Chapters 386 and 392, RSMo, in that it provides telecommunications services in the state of Missouri and is not excepted from the definition of a telecommunications company, nor is it exempt from such jurisdiction.

APPEARANCES

Paul S. DeFord, Esq., Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108-2612, for Time Warner Cable Information Services (Missouri) LLC, d/b/a Time Warner Cable.

Julie Y. Patterson, Esq., 290 Harbor Drive, Stamford, Connecticut, for Time Warner Cable Information Services (Missouri) LLC, d/b/a Time Warner Cable.

Brian T. McCartney, Esq., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri, 65102, for Intervenor Small Telephone Company Group.¹

Craig S. Johnson, Esq., 1648-A East Elm Street, Jefferson City, Missouri 65101-0537, for Intervenor Missouri Independent Telephone Company Group.²

Michael Dandino, Esq., Assistant Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

* The Commission, in an order issued on September 7, 2006, denied a motion for rehearing in this case. This case was appealed to Cole County Circuit Court (06ACCC00935).

¹ The Small Telephone Company Group consists of: BPS Telephone Company, Citizens Telephone Company, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, New Florence Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

² The Missouri Independent Telephone Company Group consists of: Alma Communications Company d/b/a Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan DIAL, Inc., and Northeast Missouri Rural Telephone Company.

David Meyer and William Haas, Esq., Associate General Counsels, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

SENIOR REGULATORY LAW JUDGE: Ronald D. Pridgin.

REPORT AND ORDER

Procedural History and Discussion

On September 23, 2005, Time Warner Cable Information Services (Missouri), LLC, d/b/a Time Warner Cable ("Time Warner"), filed a tariff, which bore an effective date of October 23, 2005. Time Warner offers "Digital Phone" service to residential customers within the exchanges where it offers cable television service. The company does not offer the same or similar service to business customers. Time Warner uses the cable television facilities of Time Warner Cable to connect to a residential customer's premises. Time Warner supplies an adapter to each subscriber, which is placed at the subscriber's residence. The adaptor interacts with the customer's existing inside wiring so that the customer can use existing telephone equipment and jacks. Time Warner routes some calls through the public switched network; calls between Time Warner subscribers do not traverse the public switched network. In the tariff filing at issue, Time Warner sought, among other things, to implement customer-specific pricing for telecommunications services.

The Staff of the Commission filed a Motion to Suspend on October 13, asserting that the tariff's pricing violated §§ 392.200.8, 392.220 and 392.450. The Commission granted the Staff's motion on October 18. On October 25, 2005, Time Warner filed a Motion for reconsideration of that suspension, asserting that the services provided used voice over internet protocol ("VoIP"), and as such the Commission was preempted from limiting Time Warner's telecommunications service offerings. Time Warner quoted the FCC's decision in the *Vonage* matter,³ in which the FCC stated, "To the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."⁴

Time Warner, the Staff of the Commission, the Small Telephone Company Group, the Missouri Independent Telephone Company Group, and the Office of the Public Counsel filed a Procedural History and Stipulation of Facts on December 23, 2005. The Commission held an on-the-record presentation on March 22, 2006.

At that proceeding and in subsequent filings, parties asserted that Time Warner's service was distinguishable from Vonage's service in that Vonage's service could be used by customers anywhere and Time Warner's service could

³ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC 22404 (2004) (cause submitted to U.S Court of Appeals in January, 2006).

⁴ *Vonage Order* at ¶32.

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only be used at the location at which the customer receives cable service. In its Post-Hearing Brief, Time Warner countered as follows:

To reiterate, the FCC identified the following characteristics that would render VoIP service offered by a cable operator subject to the same preemption applicable to Vonage's service: "a requirement for a broadband connection from the user's location; a need for IP compatible CPE; and a service offering that includes a suite of integrated capabilities and features, able to invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video. In extending the preemption it ordered with respect to Vonage to the IP-enabled voice services provided by cable operators, the FCC was clear that these three criteria constitute the entirety of the inquiry. Nowhere in the Order did the FCC indicate or refer to additional factors to be taken into account. In particular, the Vonage Order is devoid of indication that the FCC established as a fourth criteria [sic] a subjective assessment by state regulators regarding the similarities and differences between an IP-enabled voice service offered by a cable operator and the IP-enabled voice service offered by Vonage. [Footnote omitted] (at page 2).

During the pendency of this matter, on June 27, 2006, the FCC released a *Report and Order and Notice of Proposed Rulemaking* in a combined docket that included WC Docket No. 04-36, In the matter of IP-Enabled Services. On page 29, ¶156 of that Order, the FCC stated,

Under this alternative, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional nature of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The Commission has considered the parties' positions and arguments. Failure to specifically address a piece of evidence, position, or argument does not mean that the Commission failed to consider it, but instead means that the omitted material was not dispositive of this decision.

Findings of Fact

1. Time Warner is a telecommunications company certificated in Missouri by the Commission. It offers a service called Digital Phone to its Missouri consumers through outside plant and facilities owned by its affiliates, Kansas City Cable Partners and Time Warner Entertainment, d/b/a Time Warner Cable using VoIP.

2. Time Warner's service is stationary. Its customers can only use the service at the subscriber's location, which must be a location served by Kansas City Cable Partners and Time Warner Entertainment d/b/a Time Warner Cable facilities.

3. Time Warner has the ability to track the jurisdictional nature of customer calls. Digital Phone subscribers obtain telephone numbers that correlate to the actual physical location of the customer. Digital Phone can only be used at the subscriber's location, so calls to and from the Digital Phone subscriber have a discrete origination or termination point at which the call can be rated. Time Warner can identify a call as being either interstate or intrastate. Digital Phone service is identical to traditional telephone service in terms of identification of, and separation into, interstate and intrastate communications.

4. Time Warner's customers use telephone numbers associated with the customer's local rate center.

5. Time Warner offers service to residential customers within the incumbent local exchange company's exchanges where it offers cable television service. Time Warner routes some calls to Sprint Communications Company L.P. ("Sprint"), which interconnects to the public switched network. Calls between Time Warner subscribers do not traverse the public switched network. Time Warner owns and operates a softswitch and contracts with Sprint for additional switching, routing and termination of calls. Sprint also directs calls from the public switched telephone network to Time Warner's network.

Conclusions of Law

1. Time Warner is subject to the Commission's jurisdiction pursuant to Chapters 386 and 392, RSMo, in that it provides telecommunications services in the State of Missouri and is not excepted from the definition of a telecommunications company, nor is it exempt from such jurisdiction.

2. Section 392.220.1 RSMo 2000 requires telecommunications companies to have schedules on file with the Commission showing their rates, rentals and charges for service of each and every kind by or over its facilities.

3. Sections 392.220 and 392.450 mandate that telecommunications companies list the charges for their services, which Time Warner has not done for its Digital Phone service in its Tariff No. 3. Commission Rule 4 CSR 240-3.545(8)(G) requires that a telecommunications company include in its tariff a list of the services it provides and the specific rates and charges for those services in US dollars. The customer-specific pricing tariff filed by Time Warner does not list the charges for telecommunications service in US Dollars.

4. The *Vonage Order* discussed above does not serve to except or exempt Time Warner's telecommunications services offering from the jurisdiction of this Commission. Therefore, the Commission will reject the tariff.

IT IS ORDERED THAT:

1. The proposed tariff sheets submitted on September 23, 2005, by Time Warner Cable Information Services (Missouri), LLC d/b/a Time Warner Cable, and assigned Tariff No. JL-2006-0231, are rejected.

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2. All pending motions are denied.
3. This Report and Order shall become effective on August 18, 2006.
4. This case may be closed on August 19, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

**Manager of the Manufactured Housing and Modular Units
Program of the Public Service Commission, Complainant, v.
Four Seasons Manufacturing, Inc. d/b/a Four Seasons Hous-
ing, Respondent.**

Case No. MC-2006-0388
Decided August 8, 2006

Manufactured Housing §19. The Commission approved the stipulated agreement in which the Director of Manufactured Housing and Four Seasons agreed that Four Seasons pay a \$3,000 penalty, payable to public school fund of the state, within 10 days of the Commission's approval of the agreement. Four Seasons also agreed to implement a detailed quality control procedure approved by the director.

ORDER APPROVING STIPULATED AGREEMENT

Syllabus: This order approves the Stipulated Agreement filed by the parties and directs the parties to comply with its terms.

Procedural History

On April 7, 2006, the Director of the Manufactured Housing and Modular Units Program of the Public Service Commission filed a complaint. The Director claimed that Four Seasons Manufacturing, Inc.: 1) offered for sale a new modular unit home in Missouri without the required Missouri "Seal" as is required under Section 700.015(4), RSMo 2000 and Commission Rule 4 CSR 240-123.030(1); 2) failed to affix a manufacturer "Data Plate" to a new modular unit home; and, failed to list, on a copy of the manufacturer "Data Plate" sent to the Commission, the codes to which the home in question was built as is required by Commission Rule 4 CSR 240-123.080(6); and 3) shipped the home in question into Missouri without current approval from the Commission for that modular unit in violation of 4 CSR 240-123.040(11). The Director asked the Commission to not allow Four Seasons to renew its Manufacturer Registration until such time as all deficiencies are corrected and authorize the Commission's General Counsel to seek civil penalties in circuit court pursuant to Section 700.115(2), RSMo 2000.

Stipulated Agreement

On July 14, 2006, The Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission and Four Seasons Manufacturing, Inc., filed a Stipulated Agreement for the Commission's approval as a resolution of the issues in this case. On July 18, 2006, the Commission set July 25, 2006, as the deadline to object to the Stipulated Agreement. No objections were filed.

If no party objects to a stipulated agreement, the Commission may treat the stipulated agreement as unanimous.¹ Because all parties have either signed the Stipulated Agreement filed on July 14, 2006, or not opposed the agreement, the Commission will treat the Stipulated Agreement as unanimous.

The Stipulated Agreement provides as follows:

- 1) The Director agrees to move to dismiss this case;
- 2) Four Seasons agrees to pay a \$3,000 penalty, payable to the public school fund of the state, within 10 days of the Commission's approval of the agreement;
- 3) Four Seasons agrees to implement a quality control procedure approved by the Director. That quality control procedure will include:
 - (a) The steps that Four Seasons will take to renew its model plans annually and on time as required by the Commission rules.
 - (b) A detailed description of the process by which Four Seasons' Quality Control section will conduct inspections of its homes, and how these inspections will ensure that each home contains the proper Missouri Seal and Data Plate affixed to it before being shipped to Missouri.
 - (c) The job titles and positions of each manager, supervisor, and inspector charged by Four Seasons with the responsibility of conducting these inspections.
 - (d) A description of all functions or activities of Four Seasons and any third party so involved and how these functions/activities are divided.
 - (e) The signature and date of approval of the appropriate manager or supervisor of Four Seasons and its third party.

Section 536.060, RSMo 2000, and Commission Rule 4 CSR 240-2.115(1) state that the Commission may accept a stipulated agreement to resolve this case. The Commission has reviewed the Stipulated Agreement and finds it to be

¹ 4 CSR 240-2.115(2)(C).

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reasonable. The Commission determines that the Stipulated Agreement should be approved.

IT IS ORDERED THAT:

1. The Stipulated Agreement filed on July 14, 2006, is approved as a resolution of the issues in this case. A copy of the Stipulated Agreement is attached as Attachment A and incorporated as part of this order.
2. Four Seasons Manufacturing, Inc., and the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission are ordered to comply with the terms of the Stipulated Agreement.
3. This order shall become effective on August 18, 2006.
4. This case may be closed on August 19, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Voss, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

The Staff of the Missouri Public Service Commission, Complainant, v. Union Electric Company, d/b/a AmerenUE, Respondent.

*Case No. GC-2006-0350
Decided August 10, 2006*

Electric §13. The Commission approved the Stipulation and Agreement between the Staff of the Commission and Union Electric Co. d/b/a AmerenUE. The Stipulation and Agreement required AmerenUE to pay a \$2000 penalty to the public school fund, the adoption and implementation of a new procedure to be followed in any future low-pressure to high-pressure system conversions in Missouri; the submission by AmerenUE of a schedule for certain upgrades to Staff and the opportunity of staff to monitor those upgrades, if any; and, the addition of relief valves on certain systems.

ORDER APPROVING STIPULATION AND AGREEMENT

On June 14, 2006, the Staff Missouri Public Service Commission and Union Electric Company, d/b/a AmerenUE, filed a Stipulation and Agreement which purports to resolve all of the outstanding issues of this case. The Agreement requires: The payment of a \$2,000 penalty to the public school fund;¹ the adoption and implementation of a new procedure to be followed in any future low-pressure

¹ Section 386.600, RSMo.

to high-pressure system conversions in Missouri; the submission by AmerenUE of a schedule for certain upgrades to Staff and the opportunity of Staff to monitor those upgrades, if any; and, the addition of relief valves on certain systems.

In the Stipulation and Agreement, contingent upon the Commission's acceptance of the Stipulation and Agreement, the parties waived their rights to cross-examine witnesses, to present oral argument or briefs, to have the transcript read by the Commission, and to rehearing and judicial review. Section 536.060, RSMo 2000, gives the Commission the authority to accept a stipulation and agreement as a resolution of this contested case.

Commission rule 4 CSR 240-2.115 provides that if no party requests a hearing, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement. No party has requested a hearing regarding any issue and therefore, the Stipulation and Agreement will be treated as a unanimous stipulation and agreement.

After reviewing the Stipulation and Agreement, Staff's memorandum in support of the Stipulation and Agreement, and the Staff Response to Order Directing Filing, the Commission finds the Agreement to be reasonable. The Commission determines that the Agreement shall be approved.

As part of the Agreement, the parties request that the Commission's investigation case, GS-2006-0199, involving the same incident be closed. The Commission shall close that case by a separate notice filed in that case.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on June 14, 2006, is approved as a resolution of the issues in this case. A copy of the Stipulated Agreement is attached as Attachment A and incorporated as part of this order.
2. Union Electric Company, d/b/a AmerenUE, is ordered to comply with the terms of the Stipulation and Agreement.
3. No later than September 11, 2006, Union Electric Company, d/b/a AmerenUE, shall deposit \$2,000 in the Public School Fund and shall file a notice in this case indicating it has made the deposit.
4. This order shall become effective on August 20, 2006.

Davis, Chm., Murray and Appling,
CC., concur.
Clayton, C., concurs, with separate
concurring opinion to follow.
Gaw, C., dissents, with separate
dissenting opinion to follow.

Dippell, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

CONCURRING OPINION OF COMMISSIONER CLAYTON

Although this Commissioner concurs with the majority's Order Approving Stipulation and Agreement, the penalties assessed are alarmingly inadequate in the deterrence of future safety violations by Missouri gas utilities. This Commissioner has significant concerns with the current natural gas pipeline safety statutes and rules, which need urgent attention and updating. Additionally, this Commissioner would also like to see the PSC Staff adopt a more aggressive and creative approach in interpreting the current statute to hold gas utilities accountable for their actions.

For the last sixteen years and through as many legislative sessions, the Public Service Commission has advocated for sweeping revisions to our gas safety laws. In fact, federal law mandates that this Commission aggressively pursue stiffer penalties and tougher standards. This legislative proposal, known most recently as SB1031 and SB846, increases the maximum penalty the PSC could assess against a public utility for violating one of its rules. Despite bi-partisan Commissioner advocacy, the bill has been left to die at various stages of a particularly lethal legislative process.

The General Assembly should recognize the importance of improved natural gas safety laws and make the PSC's gas safety proposal a priority in the 2007 legislative session. Missouri should join the other forty-nine states in the union that have already adopted the updated versions and send a message to their constituents that safety is a top concern.

In addition, this Commissioner strongly encourages the PSC Staff to review its analysis of what constitutes a rule violation or number of violations arising from such an accident. As Staff points out:

[a] violation of this rule occurs when a low-pressure distribution system is operated at high pressure. In this case, an employee under the supervision of Ameren connected a high-pressure gas line to the low-pressure system, causing an over-pressurization of the low-pressure distribution system. The language contained in Commission rules does not define the rule violation, or even the number of violations, based on the number of customer service lines that are connected to the low-pressure distribution system. (Staff Response to Order Directing Filing, July 18, 2006).

However, the absence of a definition in statute or rule does not prohibit Staff from arguing an interpretation that the number of violations equals the number of Ameren customers affected by the explosion, for example. Alternatively, the statute does not expressly prohibit an interpretation that a violation is the number of fires or explosions or the number buildings damaged or the number of people injured. Under this analysis, the penalty would more accurately reflect the damage incurred by a community. Boonville suffered property damage in the amount of approximately \$600,000, with seven residential structures and the fire station damaged

by fire, smoke and multiple explosions. Current law as interpreted by the parties allows for a penalty of the paltry sum of \$2,000, which is .001% of Ameren's 2005 gas revenues.

The Commission should opt for strict enforcement of our current gas safety laws and continue to lead the charge for the enactment of tougher provisions in the Missouri General Assembly. While everyone is thankful that this accident involved no injuries or deaths, all incidents demand a thorough review and the tough assessment of penalties to deter future occurrences. The recommendations of Staff and Ameren's agreement for corrective action are critical components of this Stipulation that warrant support from the Commission. They will lead to improved safety. In contrast, the \$2,000 penalty, the alleged maximum under the law, is an inadequate gesture to safety and the public welfare.

For the foregoing reasons, this Commissioner concurs.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I dissent from the Order in this case which accepts a \$2,000 penalty for AmerenUE's violation of gas safety rules resulting in fires at multiple locations in the City of Boonville. This Commission has for too long been constrained in its ability to levy appropriate penalties for gas safety violations. Fortunately, the forcing of high pressure gas through low pressure lines did not result in any injuries or fatalities, but it did result in \$600,000 in property damage¹. Even if individuals would have been severely injured or killed in gas explosions in this case the position of staff is that the fine would be the same - \$2,000. For years various attempts have been made to raise the limit on penalties for gas safety violations and for as many years these attempts have failed. The penalties authorized in Missouri statutes have remained the same since 1913. The effect, considering the real value of money, is fines today are a small fraction of that originally passed by the legislature. The dangers of not following safety codes for natural gas are far too great to give it so little emphasis.

The problem in this case is not confined to the statutory cap. This gas safety rule is drafted in such a way that fires at multiple locations are treated as one incident because the applicable rule uses the word "system"². While I question whether the staff's reading of this rule is the only possible interpretation, on its surface the language does appear to treat the series of fires in Boonville as one event. The Commission should immediately start a rulemaking to correct this deficiency.

¹ Missouri Public Service Commission Case No. GS-2006-0199, Staff Gas Incident Report at pages 1,6.

² 4 CSR 240-40.030(12)(O)(1), setting the maximum and minimum allowable operating pressure for low-pressure distribution systems, states "No person may operate a low-pressure distribution **system** at a pressure greater than—A. A pressure high enough to make unsafe the operation of any connected and properly adjusted low-pressure gas utilization equipment or B. An equivalent of fourteen inches (14") water column." (emphasis added).

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Finally, even if the penalty provision does limit the maximum fine herein to \$2,000,³ it would be appropriate for the Commission to consider a probationary period for the Company to provide more intense oversight of the gas safety practices of the Company as a follow-up to the rule violations.

³ §386.570.1, RSMo, 2005.

Ronald Kitchen, Complainant, v. Missouri Gas Energy, Respondent.

Case No. GC-2006-0066
Decided August 15, 2006

Gas §33. The Commission determined that MGE violated sections 3.01 and 2.02 of its tariff when attempting to require Complainant to pay for his daughter's bill. The Commission required MGE to credit Complainant's account in the amount of \$241.71.

APPEARANCES

Ronald Kitchen, appearing pro se, 10602 East 20th Street, Independence, Missouri.

Dean Cooper, Brydon, Swearingen & England, Post Office Box 456, Jefferson City, Missouri 65102. Attorney for Missouri Gas Energy, a division of Southern Union Company.

Lera Shemwell, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Commission.

REGULATORY LAW JUDGE: Kennard L. Jones, Judge

REPORT AND ORDER**Background**

On August 8, 2005, Ronald Kitchen filed a complaint against Missouri Gas Energy alleging that MGE improperly transferred to his account a delinquent bill of another customer, Jennifer Kitchen, Ronald Kitchen's daughter. The Staff of the Commission filed its investigative memorandum on October 7, 2005. An evidentiary hearing was held on June 5, 2006.

MGE interprets its reconnection of Mr. Kitchen's service as "commencing service" and argues that under Section 3.02 of its tariff, it has acted properly. Citing a different section of MGE's tariff, Section 3.07, Staff recommended that the Commission resolve this complaint in Mr. Kitchen's favor.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

1. Mr. Kitchen opened his account, at 10602 E. 20th Street, with MGE on July 31, 1996.¹
2. Jennifer Kitchen was responsible for gas service at 416 N. Emery St.²

¹ Transcript p. 119, lines 9-10.

² Exhibit C, which includes a Customer Contact Inquiry, a current account data and an account analysis.

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3. Jennifer Kitchen is Ronald Kitchen's daughter.³
4. In 1998, MGE charged off to bad debt an amount of \$241.71 owed by Jennifer from the Emery address.⁴
5. After leaving the 416 N. Emery address, Jennifer Kitchen resided at 10602 E. 20th street, with Mr. Kitchen.⁵
6. Mr. Kitchen never resided at the Emery address.⁶
7. Because he had an overdue balance of \$367.00, MGE disconnected Mr. Kitchen's gas service on September 15, 2003.⁷
8. The disconnection of Mr. Kitchen's gas service had only to do with *his* past due balance of \$367.00, not his daughter's debt of \$241.71.⁸
9. MGE and Mr. Kitchen discussed, by telephone, reconnection of his service and his daughter's arrearage on September 17, 2003.⁹
10. Jennifer Kitchen's arrearage was transferred to Mr. Kitchen's account on September 17, 2003.¹⁰
11. Mr. Kitchen was upset and protested his daughter's arrearage being transferred to his account.¹¹
12. Mr. Kitchen did not complete an application to have his service reconnected.¹²
13. Mr. Kitchen's service was restored on September 18, 2003, after a payment of \$200 was made.¹³
14. It was not a condition of Mr. Kitchen's service being restored that he agree to pay his daughter's debt.¹⁴
15. Mr. Kitchen did not agree to pay his daughter's debt. Rather, MGE simply attached the debt to Mr. Kitchen's account.¹⁵
16. After reconnection, there was no distinction between that portion of Mr. Kitchen's bill that reflected his usage and that which reflected his daughter's debt.¹⁶

³ Transcript p. 18, lines 14-15.

⁴ Exhibit C, which includes a Customer Contact Inquiry, a current account data and an account analysis.

⁵ Staff Report, p. 15, lines 6-7.

⁶ Transcript p. 16, lines 22-24.

⁷ Transcript pp. 110-111; p. 93, lines 10-25; and p. 102, lines 10-11.

⁸ Transcript p. 81, lines 15-19.

⁹ Transcript pp. 27-29; p. 40, lines 22-25; Exhibit D, a Customer Contact Inquiry.

¹⁰ Exhibit E, Account Analysis.

¹¹ Exhibit D, Customer Contact Inquiry.

¹² Transcript p. 21, lines 15-17.

¹³ Exhibit Z1, Service Order Completion History.

¹⁴ Transcript p. 141, lines 19-25.

¹⁵ Transcript p. 28, lines 7-13; p. 29, lines 4-5; and p. 138, lines 10-15.

¹⁶ Transcript p. 126, lines 4-6.

Conclusions of Law

The facts show and the parties do not dispute that Mr. Kitchen's gas service was disconnected because he did not pay his bill. It is also clear that Jennifer Kitchen, upon moving in with Mr. Kitchen, owed an arrearage at a previous address. Although Mr. Kitchen does not offer an applicable tariff provision, Staff and MGE both offer alternative provisions that should be applied to this case.

Staff argues that Section 3.07 applies to this case, which states as follows:

Section 3.07 Discontinuance of Service – None of the following shall constitute sufficient cause for Company to discontinue service:

....

(D) The failure to pay the bill of another customer unless the customer whose service is sought to be discontinued received substantial benefit and use of the service.

The facts do not show that disconnection of service is an issue. Mr. Kitchen's service was disconnected because he did not pay *his* bill. After attaching Jennifer Kitchen's bill to Mr. Kitchen's account, MGE informed Mr. Kitchen that his service would be disconnected if he did not continue to pay his bill, which inseparably included his daughter's arrearage. However, Mr. Kitchen continued to pay his bill and his service was not thereafter disconnected. Thus, the Commission concludes that disconnection is not applicable to this case.

Alternatively, MGE asserts that the following tariff provision applies to this case:

Section 3.02 Prior Indebtedness of Customer: Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises of any former premises until payment of such indebtedness shall have been made. This provision cannot be avoided by substituting an application for service at the same or at a new location signed by some other member of the former customer's household or by any other person acting for or on behalf of such customer.

The Commission concludes that this section applies only to new applicants; not customers whose service has been reconnected after being disconnected for nonpayment. After being disconnected, Mr. Kitchen's service was not commenced, as the section describes, but was rather reconnected.

In support of its position, MGE argues that the definition of a "customer" in its tariff refers also to an "applicant." Though this is true, MGE's reasoning is flawed. Applicants, through this definition, are a subset of customers. Customers and applicants are not interchangeable. Mr. Kitchen, in this case, is a customer, not an applicant. This conclusion is supported by the following tariff provision:

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Section 2.01 Application for Service: An application for service will be required for each customer. Customers applying for gas service shall furnish sufficient information on the size and characteristics of the load, the location of the premises to be served, and such additional information as may be necessary to facilitate determination of the class of service required by customer, and the conditions under which service will be supplied. A separate application shall be made for each class of service to customer at each separate location or premises.

Under this section, applicants, who are also described as customers, are required to provide certain information in order for MGE to properly provide service. It was not necessary for Mr. Kitchen to provide information to "facilitate determination of the class of service" he would require. The Commission is unable to characterize Mr. Kitchen's service as being "commenced."

MGE's witness testified that after Mr. Kitchen's service was reconnected his daughter's arrearage was merged with his charges for service. From that point, Mr. Kitchen was unable to discern what portion of his bill was attributable to his usage for a billing period and what portion was attributable to his daughter's debt.

Section 3.01 of MGE's tariff, which is a public document on file in the Commission's records and of which the Commission takes official notice, states that MGE "will supply gas service in accordance with its rate schedules and the General Terms and Conditions for Gas Service on file with and approved by the Commission." The Commission also takes official notice of Section 2.02 of MGE's tariff, which states:

Gas service will be supplied to customer under the provision of customer's service agreement which shall be deemed to include the provisions of (a) Company's applicable rate schedule, (b) Company's General Terms and Conditions for Gas Service in effect and on file with the Commission, and (c) the Commission's applicable rules. . . .

By merging his daughter's debt with his monthly bill, MGE has effectively charged Mr. Kitchen more for his service than the company's rates allow and has not supplied gas service under its rate schedule. Also, MGE has not supplied gas service under the provisions of its tariff or the Commission's rule. Neither the rate schedule, the tariff, nor the Commission rules allowed MGE to attach Jennifer Kitchen's debt to Mr. Kitchen's bill. By doing so, the Commission concludes that MGE has violated Sections 3.01 and 2.02 of its tariff. The Commission will therefore require MGE to credit Mr. Kitchen's account in the amount of \$241.71.

IT IS ORDERED THAT:

1. Missouri Gas Energy shall, upon the effective date of this order, credit Ronald Kitchen's account in the amount of \$241.71.

2. This order shall become effective on August 25, 2006.
3. This case may be closed on August 26, 2006.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo.

**In the Matter of an Investigation into City Utilities of Springfield
Plastic Pipe Failures and the Adequacy of Its Leak Survey
Procedures, Installation Procedures and Replacement Cri-
teria.***

*Case No. GS-2004-0257
Decided August 29, 2006*

Public Utilities §5. The Commission ruled that the City Utilities of Springfield shall continue to follow the recommendations of the Staff of the Missouri Public Service Commission as previously directed and shall conduct a leak survey during calendar year 2007 over all pre-1983 plastic piping operating at high pressure that is currently not annually leak-surveyed.

**ORDER ACCEPTING STAFF REPORT, DIRECTING COMPLIANCE,
AND DIRECTING STAFF TO FILE STATUS REPORT**

On February 2, 2006, the Commission issued an Order Adopting Staff's Recommendations which, among other things, directed the Staff to file a status report in June 2006. Staff filed its response to the Commission's order on June 27, 2006, along with its status report containing a review and analysis of City Utilities of Springfield's semiannual reporting to Staff. Staff indicates that City Utilities has made progress in its plastic pipeline replacement program and that the program appears to be successful in reducing the number of leaks. Staff recommends that another status report be filed in the first quarter of 2007 covering City Utilities' activities for the last half of 2006. Staff also recommends that City Utilities be directed to conduct a leak survey during 2007 over all pre-1983 plastic piping operating at high pressure (60 psig) that is not currently surveyed annually for leaks. City Utilities did not respond to the report.

The Commission has reviewed Staff's status report and finds that the recommendations set out by Staff are reasonable and shall be followed. In addition, the Commission will direct Staff to file a status report as directed below.

IT IS ORDERED THAT:

1. The Staff of the Commission shall file its next status report in this case no later than March 30, 2007.

* See page 205 for another order in this case.

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2. Any response to Staff's report shall be filed no later than April 16, 2007.
3. City Utilities of Springfield shall continue to follow the recommendations of the Staff of the Missouri Public Service Commission as previously directed and shall conduct a leak survey during calendar year 2007 over all pre-1983 plastic piping operating at high pressure (60 psig) that is not currently annually leak-surveyed.
4. This order shall become effective on September 8, 2006.

Davis, Chm., Murray, Clayton,
and Appling, CC., concur.
Gaw, C., dissents, with separate
opinion to follow.

Dippell, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER STEVE GAW

This Commissioner dissents from the Majority Order because it fails to require City Utilities to take sufficient corrective action on certain plastic lines in its gas delivery system. The Staff report with which the Majority has directed CU's compliance does not set forth requirements for the replacement of all brittle, leaking, or unsafe pipe, unless it is covered with rock backfill. By ignoring that the pipe itself is defective, and focusing only on pipe laid in rock, the Commission fails to adequately protect citizens against potentially dangerous situations, where pipe that was declared defective (recalled) is still servicing communities.

This Order only specified that a leak survey would be conducted. This is not enough. The Commission needs to also order a firm pipe replacement plan and extensive testing of pipe to determine whether it is safe under normal conditions. Furthermore, based upon the finding of additional rock backfill since its initial investigation, there is a need for Staff to further investigate and evaluate whether CU violated any Commission rules regarding the placement of rock backfill in and around these pipes. For these reasons I continue to dissent.

The Staff of the Missouri Public Service Commission, Complainant, v. Hurricane Deck Holding Company, Chelsea Rose Land Owners Association, Inc., Gregory D. Williams, Debra J. Williams, and Charles H. Williams, Respondents.*

Case No. WC-2006-0303

Decided August 31, 2006

Sewer §1. The Commission ruled that Hurricane Deck Holding Company offered services to the public and therefore made itself subject to regulation as a public utility. The statutory definition of a water and sewer corporation does not include a requirement that the owner of the corporation actually receive payment for such services.

Sewer §4. The fourth count of the Staff's complaint alleged that Hurricane Deck Holding Company violated §393.190.1 by transferring the water and sewer systems serving the Chelsea Rose Service Area from Hurricane Deck Holding Company to Chelsea Rose Land Owners Association without having obtained authorization from the Commission. The Commission ruled that the Staff of the Commission would not be granted summary judgment on this count.

Water §1. The Commission ruled that Hurricane Deck Holding Company offered services to the public and therefore has made itself subject to regulation as a public utility. The statutory definition of a water and sewer corporation does not include a requirement that the owner of the corporation actually receive payment for such services.

Water §4. The fourth count of the Staff's complaint alleged that Hurricane Deck Holding Company violated §393.190.1 by transferring the water and sewer systems serving the Chelsea Rose Service Area from Hurricane Deck Holding Company to Chelsea Rose Land Owners Association without having obtained authorization from the Commission. The Commission ruled that the Staff of the Commission would not be granted summary judgment on this count.

**ORDER GRANTING IN PART AND DENYING IN PART STAFF'S
MOTION FOR SUMMARY DETERMINATION**

The Staff of the Commission filed a complaint against Hurricane Deck Holding Company, Chelsea Rose Land Owners Association, Inc., Gregory D. Williams, Debra J. Williams, and Charles H. Williams on January 23, 2006. The Respondents filed a Motion to Dismiss on February 24, which the Commission denied on March 7. The Respondents then filed their answer to the complaint on March 17.

On July 11, Staff filed a Motion for Summary Disposition, alleging that there are no disputed material facts and that Staff is entitled to a judgment as a matter of law. The Respondents filed a response in opposition to Staff's Motion for Summary Disposition on August 16. As part of that response, the Respondents included an affidavit of Gregory D. Williams asserting facts supporting the Respondents' position. Staff filed a reply to that response on August 18.

* Petition for Writ of Review filed on October 12, 2006, Cole County Circuit Court (06AC-CC00966)

FINDINGS OF FACT

In its motion for summary determination, Staff asserted that certain material facts are undisputedly true. The Respondents did not contest many of the assertions and those facts will be accepted as true without further discussion. The asserted facts that are not admitted will be discussed in more detail. The Commission finds that the following facts are true:

1. Respondent Hurricane Deck Holding Company is a Missouri general business corporation in good standing, incorporated on June 6, 1988. Its principal place of business is located at P.O. Box 431, Sunrise Beach, MO 65079.
2. Respondent Chelsea Rose Land Owners Association is a Missouri non-profit corporation in good standing, incorporated on December 12, 2005. Its principal place of business is P.O. Box 431 Sunrise Beach, MO 65079.
3. Respondent Gregory D. Williams is the president, director, and registered agent of Respondent Hurricane Deck Holding Company.
4. Respondent Gregory D. Williams is the incorporator of Respondent Chelsea Rose Land Owners Association.
5. Respondent Gregory D. Williams is listed as a member of the Board of Managers in Respondent Chelsea Rose Land Owners Association's Articles of Incorporation.
6. Respondent Gregory D. Williams is the registered agent of Respondent Chelsea Rose Land Owners Association.
7. Respondent Debra J. Williams is the secretary of Respondent Hurricane Deck Holding Company.
8. Respondent Debra J. Williams is listed as a member of the Board of Managers of Respondent Chelsea Rose Land Owners Association in the Association's Articles of Incorporation.
9. Respondent Debra J. Williams' address is listed on Chelsea Rose Land Owners Association's Articles of Incorporation as P.O. Box 431, Sunrise Beach, MO 65079.
10. Respondent Charles H. Williams is listed as one of the original members of the Board of Managers of Respondent Chelsea Rose Land Owners Association in the Association's Articles of Incorporation.
11. Respondent Charles H. Williams' address is listed in Respondent Chelsea Rose Land Owners Association's Articles of Incorporation as P.O. Box 431, Sunrise Beach, MO 65079.
12. Osage Water Company is a general Missouri business corporation in good standing. Its registered agent is William P. Mitchell and its registered office is located at 328 Frontage Road, Osage Beach, MO 65065.
13. Osage Water Company has certificates of convenience and necessity issued by the Missouri Public Service Commission to provide water and sewer services in Camden County, Missouri.
14. Osage Water Company's Water and Sewer Tariffs include the Chelsea Rose Service area.
15. On October 21, 2005, the Circuit Court of Camden County, Missouri, at the request of the Commission, appointed Gary V. Cover of Clinton, Missouri, as receiver for Osage Water Company, pursuant to Section 393.145.

16. Osage Water Company and its officers, agents, representatives, and past contractual agent and representative, Environmental Utilities, were directed to cooperate with Mr. Cover and to transfer control of Osage Water Company to him and to deliver all records and assets to him.

17. On or about December 30, 2005, Respondent Hurricane Deck Holding Company sent a letter headed "Water and Sewer Issues" to the homeowners in the Chelsea Rose Service Area.

18. Respondent Hurricane Deck Holding Company's December 30, 2005 letter informed the homeowners in the Chelsea Rose Service Area that Osage Water Company had gone into receivership. The letter also claimed that Hurricane Deck Holding Company's water and sewer facilities had never been transferred to Osage Water Company and that Articles of Incorporation had been filed for Respondent Chelsea Rose Land Owners Association. The letter stated an intention to transfer Respondent Hurricane Deck Holding Company's interest in the Chelsea Rose Service Area's water and sewer facilities to Respondent Chelsea Rose Land Owners Association.

19. Respondent Debra J. Williams signed this letter on behalf of Respondent Hurricane Deck Holding Company.

20. Staff asserts that the following facts are true:

Included with the December 30, 2005 letter was a document entitled "HDHC Quarterly Water and Sewer Assessment." This assessment billed homeowners for water and sewer services for the period between September 22, 2005 and December 30, 2005. Each homeowner was billed \$52.48. Homeowners were directed to make the payments payable to Hurricane Deck Holding Company. The total number of homeowners billed was thirty (30).

The Respondents do not deny the authenticity of the letter described by Staff. However, they deny that the affected homeowners were billed for water and sewer services. Instead, they assert that the homeowners were "assessed their proportionate share of the costs of operation of common amenities of the subdivisions in which they reside, including a water supply and distribution system and a sewer plant and sewer collection system."

The Respondents further assert that Hurricane Deck Holding Company, Gregory D. Williams, Debra J. Williams and Charles H. Williams did not receive any funds as a result of the December 30, 2005 assessments. Instead, the funds that were received were deposited to the account of the Chelsea Rose Land Owners Association. The Chelsea Rose Land Owners Association subsequently returned those funds to the homeowners.

Finally, the Respondents assert that Hurricane Deck Holding Company is the owner of the water and sewer utility systems which it has constructed within its development project.

Staff's reply does not deny the truth of the Respondents' assertions, but Staff does deny that those facts alter Staff's conclusion that either Hurricane Deck Holding Company or Chelsea Rose Home Owners Association is operating a water and sewer utility without proper authority.

Based on the uncontested assertions of the parties, the Commission finds that the following facts are true:

A December 30, 2005 letter, issued on the letterhead of Hurricane Deck Holding Company and signed by Debra J. Williams as Secretary of that corporation, asked each homeowner receiving water and sewer service from the water and sewer systems owned by Hurricane Deck Holding Company to pay \$52.48 for water and sewer services for the period between September 22, 2005 and December 30, 2005. Homeowners were directed to make the payments payable to Hurricane Deck Holding Company. The total number of homeowners billed was thirty (30).

Hurricane Deck Holding Company, Gregory D. Williams, Debra J. Williams and Charles H. Williams did not receive any funds as a result of the December 30, 2005 assessments. Instead, the funds that were received were deposited to the account of the Chelsea Rose Land Owners Association. The Chelsea Rose Land Owners Association subsequently returned those funds to the homeowners.

21. No Respondent has a certificate of convenience and necessity authorizing provision of water and sewer service to the public.

22. No Respondent has a current permit from the Missouri Department of Natural Resources authorizing the operation of a sewer system in the Chelsea Rose Service Area.

23. In a letter dated January 20, 2006, Respondent Gregory D. Williams stated "[t]he water and sewer system serving the Chelsea Rose development is owned by Hurricane Deck Holding Company."

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Commission Rule 4 CSR 240-2.117(1) establishes the procedure for the filing of a motion for summary determination in cases before the Commission.

2. Commission Rule 4 CSR 240-2.117(1)(E) provides that the Commission may grant a motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that the granting of summary determination is in the public interest.

3. Commission Rule 4 CSR 240-2.117(F) provides that if the Commission grants a motion for summary determination but does not thereby resolve the entire case, it shall hold a hearing to resolve the remaining issues.

4. Section 386.020(58), RSMo Supp. 2005, defines "water corporation" as including:

every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal or power station, distributing or selling for distribution, or selling or supplying for gain any water.

5. Section 386.020(48), RSMo Supp. 2005, defines "sewer corporation" as including:

every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees, or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets.

6. Section 393.170, RSMo 2000, provides that no water or sewer corporation may construct or operate a water or sewer system without first obtaining the permission and approval of the Commission.

7. The regulations of the Missouri Department of Natural Resources, specifically 10 CSR 20-6.010(5)(A), require the owner or operator of a wastewater treatment facility that discharges to waters of the state to obtain an operating permit before any discharge occurs.

8. Commission Regulation 4 CSR 240-60.020 requires a sewer utility to operate a sewage treatment facility in compliance with the laws and regulations of the state and local health authority.

9. The definition of "sewer utility" for purposes of 4 CSR 240-60 is found at 4 CSR 240-60.010(J) and is the same as the definition of "sewer corporation" found in Section 386.020(48), RSMo Supp. 2005.

10. Section 393.190.1, RSMo 2000, provides that no water or sewer corporation may sell or otherwise transfer its water or sewer system without having first obtained authorization to do so from the Commission.

11. Section 386.570, RSMo 2000, provides that "any corporation, person or public utility" that violates, or fails to obey any law is subject to a penalty of between \$100 and \$2,000 for each offense.

12. Section 386.600, RSMo 2000, authorizes the general counsel of the Commission to file an action in any circuit court in Missouri to recover a penalty authorized by statute.

DECISION

Staff's complaint contains five separate counts and Staff's seeks summary determination in its favor on all five counts. The Commission will address each count in turn.

Count I

The first count of Staff's complaint alleges that "the Respondents, or some of them," are operating the water and sewer systems serving the Chelsea Rose Service Area as water and sewer corporations and are thus subject to the jurisdiction of the Commission. The facts alleged in Staff's motion for summary determination establish that Hurricane Deck Holding Company has claimed ownership of the water and sewer systems serving the Chelsea Rose Service Area. The Respondents do not dispute that fact. The facts also establish that Hurricane Deck Holding Company has billed the residents of that service area for water and sewer service.

The Respondents argue that Hurricane Deck Holding Company is not operating a public water and sewer utility because it is merely offering such services to the residents of a particular subdivision and not to the public at large. However, a review of the controlling cases, including the cases cited by the Respondents, indicates that they do not support such a distinction.

In *State ex rel M.O. Danciger & Co. v. Public Service Commission*,¹ the Missouri Supreme Court reversed a decision of the Public Service Commission that had found the Danciger company to be a public electric utility. Mr. Danciger was the owner of a pre-prohibition brewery in Weston, Missouri. The brewery installed electric generation equipment to power the lights and machinery at its plant. The brewery found that it had extra generating capacity so Mr. Danciger began allowing his friends within a few blocks of the brewery to string electric lines to tap into the brewery's generator and purchase available electric power. The local newspaper was one of these friends allowed to buy electric power until the paper published an editorial supporting prohibition. The next day, Danciger cut the electric line running to the newspaper office.

Based on the unique facts of that case, the Supreme Court found that Danciger was not operating as a public utility because it was not offering electric service to the public. Rather, the company was merely offering electric service to select friends within a few blocks of the brewery. As a result, Danciger and the brewery had no legal obligation to continue to provide electric service to the prohibition-supporting newspaper. Nevertheless, the *Danciger* court supported the general view that a company that supplies a utility service to the public may be regulated as a public utility.

That view was explicitly reaffirmed a few years later in *State ex rel. Cirese v. Public Service Commission*.² In that case, Cirese owned a factory that produced excess electricity. When the Public Service Commission sought to regulate the company's sale of electricity, Cirese relied on the *Danciger* decision to argue that the company should not be regulated as a public utility. However, rather than merely offering to sell electricity to a few friends, Cirese indiscriminately offered electric service to outside customers that he solicited through newspaper advertisements and handbills. Again, the court held that a company that offers a utility service to the public can be regulated as a public utility. More recently, in the other case cited by the Respondents, *Osage Water Company v. Miller County Water Authority*,³ the Court of Appeals found that a company that offers water service to the public for compensation meets the definition of a public utility even if it is operating as a nonprofit corporation and is only providing service to a few subdivisions.

The key fact is that by sending out bills to the residents, Hurricane Deck Holding Company offered service to all residents of the given subdivisions. It is not purporting to merely offer service to a few friends. By offering water and sewer utility services to the public, even if that public is confined to the residents of a few

¹ 275 Mo. 483, 205 S.W. 36, (Mo 1918)

² 178 S.W. 2d 788 (Mo. App. K.C. 1944)

³ 950 S.W.2d 569 (Mo. App. S.D. 1997)

subdivisions, Hurricane Deck Holding Company has made itself subject to regulation as a public utility.

Hurricane Deck Holding Company also argues that it is not a public utility because it has never received any payment from customers for the operation of its water and sewer systems. Instead, it contends that the payments that were received from customers were initially turned over to Chelsea Rose Land Owners Association, and ultimately were returned to the customers. However, the statutory definition of water corporation and sewer corporation do not include a requirement that the owner of the corporation actually receive payment for such services. Rather, the definition depends upon an intent to supply water or sewer service for gain or compensation. Sending a bill to customers for the provision of water and sewer service meets the definition of operating a system for gain, regardless of whether any customer actually pays the bill.

Therefore, the Commission concludes that Hurricane Deck Holding Company is offering water and sewer service to the public for gain and meets the statutory definition of a water and sewer corporation. As such, it is subject to the Commission's regulation. Granting Staff's motion for summary determination is in the public interest so that the public can be assured that if Hurricane Deck Holding Company provides service to the public, it provides safe and adequate service. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. Staff's motion for summary determination regarding Count I of its complaint, as applied to Respondent Hurricane Deck Holding Company, will be granted.

The allegations in Count I of Staff's complaint are not, however, limited to Hurricane Deck Holding Company. Staff alleges that all, or at least some, of the Respondents are subject to the Commission's jurisdiction as public utilities. Aside from Hurricane Deck Holding Company, the other Respondents are Chelsea Rose Land Owners Association, Inc., and Gregory D. Williams, Debra J. Williams, and Charles H. Williams, as individuals. The facts described in Staff's motion for summary determination establish that Hurricane Deck Holding Company stated an intention to turn over the water and sewer system serving the Chelsea Rose Service Area to the Chelsea Rose Land Owners Association. Staff does not, however, describe any facts that would indicate that the Chelsea Rose Land Owners Association ever took possession of that water and sewer system, or that the Association ever offered water and sewer services to the public. Rather, it was Hurricane Deck Holding Company that possessed the water and sewer system and offered service to the public. While the proceeds resulting from Hurricane Deck Holding Company's solicitation of payment for water and sewer service were deposited for a time in the account of Chelsea Rose Land Owners Association, that fact alone is not sufficient to conclude that the Association was offering water and sewer service to the public. In sum, Staff has not presented sufficient evidence to indicate that Chelsea Rose Land Owners Association is a public utility subject to the Commission's regulation. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count I of its complaint, as applied to Respondent Chelsea Rose Land Owners Association, must be denied.

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Similarly, Count I of Staff's complaint alleges that the three named individuals – Gregory D. Williams, Debra J. Williams, and Charles H. Williams – are operating as public utilities subject to regulation by the Commission. Again, the motion for summary determination does not describe sufficient facts to establish that any of these people, as individuals, rather than as corporate officers on behalf of Hurricane Deck Holding Company, are offering water or sewer service to the public. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count I of its complaint, as applied to Respondents Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count II

The second count of Staff's complaint alleges that "the Respondents, or some of them," are violating Section 393.170, RSMo 2000, by operating a water and sewer system without authorization from the Commission. As with Count I of the complaint, the facts alleged in Staff's motion for summary determination establish that Hurricane Deck Holding Company has claimed ownership of the water and sewer systems serving the Chelsea Rose Service Area. The facts also establish that Hurricane Deck Holding Company has billed the residents of that service area for water and sewer service. Therefore, Hurricane Deck Holding Company is offering water and sewer service to the public for gain and meets the statutory definition of a water and sewer corporation. Hurricane Deck Holding Company has not obtained authority from the Commission to operate a water and sewer system and has, therefore, violated Section 393.170, RSMo 2000. Granting Staff's motion for summary determination is in the public interest so that the public can be assured that if Hurricane Deck Holding Company provides service to the public, it provides safe and adequate service. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. Staff's motion for summary determination regarding Count II of its complaint, as applied to Respondent Hurricane Deck Holding Company, will be granted.

Once again, the facts described in Staff's motion for summary determination do not establish that Chelsea Rose Land Owners Association or the three named individuals have operated a water and sewer system in violation of the statute. For that reason, Staff's motion for summary determination regarding Count II of its complaint, as applied to Respondents Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count III

The third count of Staff's complaint alleges that "the Respondents, or some of them," are operating a sewer system without having obtained the required permit from the Missouri Department of Natural Resources. Because of the failure to obtain that permit, Staff alleges that the "Respondents, or some of them," are in violation of a Commission rule, 4 CSR 240-60.020, which requires the operator of a sewer utility to comply with the laws and regulations of the state and local health authority. As the Commission has previously found, Hurricane Deck Holding Company is operating as a public sewer utility subject to regulation by the

Commission. As such, it is also subject to regulation by the Missouri Department of Natural Resources. Its failure to comply with the regulations of the Missouri Department of Natural Resources places Hurricane Deck Holding Company out of compliance with Commission Rule 4 CSR 240-60.020. Granting Staff's motion for summary determination is in the public interest so that the public can be assured that if Hurricane Deck Holding Company provides service to the public, it provides safe and adequate service. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. Staff's motion for summary determination regarding Count III of its complaint, as applied to Respondent Hurricane Deck Holding Company, will be granted.

As the Commission has previously found, the facts described in Staff's motion for summary determination do not establish that Chelsea Rose Land Owners Association or the three named individuals have operated a sewer system in violation of the any statute or regulation. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count III of its complaint, as applied to Respondents Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count IV

The fourth count of Staff's complaint alleges that "the Respondents, or some of them," have violated Section 393.190.1, RSMo 2000, by transferring the water and sewer systems serving the Chelsea Rose Service Area from Hurricane Deck Holding Company to the Chelsea Rose Land Owners Association without having obtained authorization from the Commission. The Commission has previously found that Hurricane Deck Holding Company is operating the water and sewer systems in question as a water and sewer utility. Therefore, it would have to obtain authorization from the Commission before transferring those systems to another entity. The Commission has not granted such authority.

However, the facts alleged in Staff's motion for summary determination establish only that Hurricane Deck Holding Company has, in a letter to its customers, expressed an intention to transfer those water and sewer systems to Chelsea Rose Land Owners Association. Staff does not present sufficient facts to establish that such a transfer has actually occurred. Indeed, in Count IV of its complaint, Staff alleges that it does not know whether the transfer of the water and sewer system has already occurred. The existence of a letter stating an intention to transfer the water and sewer system at some future time does not establish a violation of Section 393.190.1, RSMo 2000, by any of the Respondents. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law. For that reason, Staff's motion for summary determination regarding Count IV of its complaint, as applied to Respondents Hurricane Deck Holding Company, Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, and Charles H. Williams, must be denied.

Count V

The fifth count of Staff's complaint asks for authority for the Commission's general counsel to file a petition in circuit court to seek monetary penalties against

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the Respondents for violations of Missouri statutes and the Commission's regulations. The Commission has found that Hurricane Deck Holding Company has violated Missouri statutes and Commission regulations as alleged in counts I, II and III of Staff's complaint. Summary determination of this issue protects the public interest by enabling the Commission to enforce its regulations by seeking appropriate penalties for non-compliance. There is no genuine issue as to any material fact and Staff is entitled to relief as a matter of law. The general counsel will be authorized to seek monetary penalties against Hurricane Deck Holding Company for those violations. The Commission has not found that any other Respondent has violated any Missouri statute or Commission regulation. Therefore, a genuine issue of material fact remains and Staff is not entitled to relief as a matter of law.

Further Proceedings

The Commission has found that Staff is entitled to summary determination against one of the Respondents on four of the five counts of its petition. Conversely, Staff's motion for summary determination as to the other count, and the other Respondents, will be denied. However, a denial of summary determination does not preclude Staff from proceeding to hearing to present whatever evidence it may have to support the allegations that have not been summarily determined. Commission Rule 4 CSR 240-2.117(F) provides that "[i]f the commission grants a motion for summary determination that does not dispose thereby of the entire case, it shall hold an evidentiary hearing to resolve the remaining issues." That means that Staff's complaint is not yet finally resolved.

In order to move this complaint to a prompt and final resolution, the Staff will be directed to file a pleading indicating whether it intends to present evidence to prove the allegations against the Respondents for which summary determination has been denied. In the alternative, Staff may file a motion asking leave to dismiss the allegations of its complaint for which summary determination has been denied. Until all allegations of Staff's complaint are finally resolved, this order must be treated as interlocutory and not yet subject to appeal. That also means that Staff may not proceed to file a petition in circuit court seeking penalties until all aspects of its complaint are finally resolved.

IT IS ORDERED THAT:

1. Staff's motion for summary determination regarding Counts I, II, III, and V of its complaint, as applied to Hurricane Deck Holding Company, is granted.
2. Staff's motion for summary determination regarding Counts IV of its complaint, as applied to Hurricane Deck Holding Company, is denied.
3. Staff's motion for summary determination regarding Counts I, II, III, IV, and V of its complaint, as applied to Chelsea Rose Land Owners Association, Gregory D. Williams, Debra J. Williams, or Charles H. Williams, is denied.
4. The general counsel is authorized to file a petition in circuit court seeking monetary penalties, as allowed by law, against Hurricane Deck Holding Company.
5. No later than September 11, 2006, the Commission's Staff shall file a pleading indicating whether it intends to present evidence to prove the allegations against the

Respondents for which summary determination has been denied. In the alternative, Staff may file a motion asking leave to dismiss the allegations of its complaint for which summary determination has been denied.

6. This order shall become effective on September 20, 2006.

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., absent

Woodruff, Deputy Chief Regulatory Law Judge

**In the Matter of the Empire District Electric Company of Joplin,
Missouri for Authority to File Tariffs Increasing Rates for
Electric Service Provided to Customers in the Missouri
Service Area of the Company.***

*Case No. ER-2006-0315
Decided August 31, 2006*

Electric §20. The Empire District Electric Company of Joplin, Missouri is authorized by the Commission to increase their rates for the electric service provided to its customers in the service area located in Missouri.

**ORDER APPROVING STIPULATION AND
AGREEMENT AS TO CERTAIN ISSUES**

On August 18, 2006, the Staff of the Missouri Public Service Commission and The Empire District Electric Company filed a Stipulation and Agreement as to Certain Issues, agreeing to disposition of several issues in dispute between Empire and the Staff. A copy of the Stipulation and Agreement is attached to this order as Attachment A.

As to those issues disposed of in the Stipulation and Agreement, contingent upon the Commission's acceptance of the Stipulation and Agreement, the parties waived their respective rights to present oral argument and written briefs pursuant to §563.080.1 RSMo 2000; their respective rights to the reading of the transcript by the commission pursuant to RSMo §536.080.2 RSMo 2000; their respective rights §536.500 RSMo 2000; and their respective rights to judicial review pursuant to §386.510 RSMo 2000. Moreover, both Parties' witnesses' testimony will be accepted into the record without cross-examination or formal submission at the evidentiary hearing. The waiver does not apply to any matters raised in any prior or subsequent Commission proceeding or any matters not explicitly addressed by the Stipulation and Agreement. No Party objected to this stipulation. 4 CSR 240-2.115 gives the Commission the authority to accept a stipulation and agreement as a resolution to certain issues of a contested case.

* See pages 344 and 477 for other orders in this case.

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After reviewing the Stipulation and Agreement, the Commission finds the Agreement to be reasonable. The Commission determines that the Agreement shall be approved.

IT IS ORDERED THAT:

1. The Stipulation and Agreement as to Certain Issues filed on August 18, 2006 is approved as a resolution to certain issues in this case (Attachment A).
2. All signatory parties shall comply with the terms of the Stipulation and Agreement.
3. Such testimony as identified on pages four and five of the Stipulation and Agreement shall be received into evidence without the necessity of the witnesses taking the stand at the evidentiary hearing.
4. This order shall become effective on August 31, 2006.

Davis, Chm., Gaw, Clayton, Appling, CC., concur
Murray, C., absent.

Dale, Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

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ACCOUNTING

III. PARTICULAR ITEMS

§38. Taxes

The Commission authorized an accounting authority order to permit a gas company to defer the cost of property taxes imposed by the state of Kansas while the company challenged the legality of the taxes in the Kansas courts.--Missouri Gas Energy 14 MPSC 3d 1.

Taxes assessed under a statute of questionable constitutionality were not "known" so as to be includable in a gas company's rates while the constitutionality of the tax was being challenged in court.--Missouri Gas Energy 14 MPSC 3d 1.

§42. Accounting Authority Orders

Based on the Sibley standard that the Commission has applied to requests for accounting authority orders for fifteen years, an accounting authority order is appropriate if the applicant demonstrates that the costs to be deferred are "extraordinary, unusual and unique, and not recurring."--Missouri Gas Energy 14 MPSC 3d 1.

The Commission authorized an accounting authority order to permit a gas company to defer the cost of property taxes imposed by the state of Kansas while the company challenged the legality of the taxes in the Kansas courts.--Missouri Gas Energy 14 MPSC 3d 1.

An accounting authority order is not a guarantee that the company will be able to recover all of its deferred expenses in rates.--Missouri Gas Energy 14 MPSC 3d 1.

Any accounting authority order creates a mismatch between the customers who benefit from the expenditure and the customers who will be required to pay those costs. For that reason a deferral should not be allowed to continue any longer than necessary.--Missouri Gas Energy 14 MPSC 3d 1.

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§34. Public convenience and necessity or public benefit

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri because the Commission has the authority to consider land use issues for power plants proposed for first-class non-charter counties, such as Cass County. Also, the Commission more properly hears other issues (such as identifying locations of existing gas pipelines that could deliver sufficient fuel at acceptable pressure) as well as zoning. Also, the Western Districts opinion and the Circuit Court of Cass County's order also come into play as factors.--Aquila, Inc. 14 MPSC 3d 327.

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri because the Commission has the authority to consider land use issues for power plants proposed for first-class non-charter counties, such as Cass County. Also, the Commission more properly hears other issues (such as identifying locations of existing gas pipelines that could deliver sufficient fuel at acceptable pressure) as well as zoning. Also, the Western Districts opinion and the Circuit Court of Cass County's order also come into play as factors.--Aquila, Inc. 14 MPSC 3d 400.

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

§43. Gas

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.--Aquila, Inc. 14 MPSC 3d 328.

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.--Aquila, Inc. 14 MPSC 3d 400.

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- §2. Right to allowance for depreciation
- §3. Reports, records and statements
- §4. Obligation of the utility

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- §15. Factors affecting annual allowance generally
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DEPRECIATION

No headnotes in this volume involved the question of depreciation.

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- §2. Obligation of the utility
- §3. Recovery of damages for discrimination
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- §5. Reports, records and statements

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- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the local authorities

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- §9. Competitor's right to equal treatment
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- §16. Special rates
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V. RATES AND CHARGES OF PARTICULAR UTILITIES

- §22. Electric and power
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- §28. Service generally
- §29. Abandonment and discontinuance
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VII. SERVICE BY PARTICULAR UTILITIES

- §35. Electric and power
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- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

DISCRIMINATION

No headnotes in this volume involved the question of discrimination.

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- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
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II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally**
- §8. Jurisdiction and powers of Federal Commissions**
- §9. Jurisdiction and powers of the State Commission**
- §10. Jurisdiction and powers of the local authorities**
- §11. Territorial agreements**
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- §14. Rules and regulations**
- §15. Cooperatives**
- §16. Public corporations**
- §17. Abandonment and discontinuance**
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- §20. Rates**
- §21. Refunds**
- §22. Revenue**
- §23. Return**
- §24. Services generally**
- §25. Competition**
- §26. Valuation**
- §27. Accounting**
- §28. Apportionment**
- §29. Rate of return**
- §30. Construction**
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- §34. Additions and betterments**
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- §36. Local service**
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- §43. Accounting Authority orders**
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IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally**
- §47. Physical connection**
- §48. Contracts**
- §48.1 Qualifying facilities**
- §49. Records and statements**

ELECTRIC
I. IN GENERAL**§ 1. Generally**

The Commission granted Empire District Electric Company's application to sell up to \$200,000,000 of First Mortgage Bonds issued under its existing indenture of Mortgage and Deed of Trust. The Commission also outlined many of specific requirements that Empire must meet. The transaction also was not considered to be detrimental to public interest.--The Empire District Electric Company 14 MPSC 3d 341.

The Commission granted the Motion for Clarification filed by the Staff of the Missouri Public Service Commission, The Empire District Electric Company, Kansas City Power and Light Company and the Southwest Power Pool, Inc.--Kansas City Power & Light 14 MPSC 3d 530.

The Commission led a formal investigation of Union Electric Company d/b/a AmerenUE regarding the effectiveness of the storm restoration efforts in Eastern Missouri. The report was required to have been filed by August 7, 2006.--Union Electric 14 MPSC 3d 554.

§3. Certificate of convenience and necessity

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.--Aquila, Inc. 14 MPSC 3d 400.

§4. Transfer, lease and sale

A Chapter 100 financing arrangement involving the sale and lease back of utility plant is not the type of transaction that Section 393.190 was meant to cover. The utility does not give up control over the assets, and the assets were not providing electricity on the date of the transfer.--Aquila, Inc. 14 MPSC 3d 176.

This order allowed AmerenUE to assume a leasehold interest in Audrain County's NRG Audrain Facility. The Commission authorized AmerenUE to execute, deliver and perform the agreements and instruments necessary to the lease pertaining to the NRG Audrain combustion turbine

generator facility owned by Audrain County, Missouri.--Union Electric 14 MPSC 3d 260.

The Empire District Electric Company is authorized to transfer to the Southwest Power Pool, Inc. control of certain transmission assets.--The Empire District Electric Company 14 MPSC 3d 466.

Kansas City Power and Light Company is authorized to transfer conditional and interim functional control of certain transmission assets to the Southwest Power Pool, Inc. During KCPL's transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri PSC's jurisdiction as specifically described in the Stipulation and Agreement.--Kansas City Power & Light 14 MPSC 3d 470.

The Commission issued an Order approving Stipulation and Agreement and in return the parties filed a motion of clarification requesting the Commission clarify several areas of concern in the Commission Order that were inconsistent with the stipulation and agreement.--The Empire District Electric Company 14 MPSC 3d 534.

II. JURISDICTION AND POWERS

§9. Jurisdiction and powers of the State Commission

The Commission has the authority to grant a variance from a provision of an electric company's tariff forbidding the reselling of electricity through a master meter where it is in the public interest to do so.--WST, Inc. 14 MPSC 3d 116.

Aquila is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo, and the Commission has jurisdiction over Aquila's application.--Aquila, Inc. 14 MPSC 3d 400.

III. OPERATIONS

§13. Operations generally

The Commission approved the Stipulation and Agreement between the Staff of the Commission and Union Electric Co. d/b/a AmerenUE. The Stipulation and Agreement required AmerenUE to pay a \$2000 penalty to the public school fund, the adoption and implementation of a new procedure to be followed in any future low-pressure to high-pressure system conversions in Missouri; the submission by AmerenUE of a schedule for certain upgrades to Staff and the opportunity of staff to monitor those upgrades, if any; and, the addition of relief valves on certain systems.--PSC Staff v. Union Electric 14 MPSC 3d 571.

§14. Rules and regulations

The Commission's regulation that forbids the installation of master electric meters for multi-occupant buildings – 4 CSR 240-20.050 – does not apply to buildings constructed before June 1, 1981.--WST, Inc. 14 MPSC 3d 116.

§20. Rates

The Commission found that the stipulation and agreement of the parties was reasonable in that it resolves all disputes between the parties regarding the proposed rate increase.--Aquila, Inc. 14 MPSC 3d 232.

Empire sought to terminate the use of the interim energy charge ("IEC") and implement an energy cost recovery rider ("ECR"). The Commission agreed to it but clarified that The Empire District Electric Company, pursuant to the Stipulation and Agreement, was not to make any request for an energy cost recovery rider while the existing interim energy charge was effective.--The Empire District Electric Company 14 MPSC 3d 344.

§38. Financing practices

The Commission approved KCPL's request to issue up to \$635 million of debt securities. KCPL needed that financing to pay for the investments it agreed to make in its experimental regulatory plan, which the Commission approved in a separate case.--KCPL 14 MPSC 3d 148.

§39. Costs and expenses

The Commission ordered that KCPL was not required to pay for the relocation or burial of power lines on Belleview Ave. When the City requires KCPL to relocate its facilities on 26th Street according to its usual practice, KCPL must comply with the city's request at their own expense.--City of Kansas City v. KCPL 14 MPSC 3d 303.

§41. Billing practices

Where the Commission granted the developer of a condominium building a variance from an electric company's tariff to permit the installation of a master meter to serve all residents of the building, the Commission required the developer to adhere to the relevant consumer protection requirements found in the Commission's regulations.--WST, Inc. 14 MPSC 3d 116.

§42. Planning and management

The Commission ordered the Staff of the Commission to conduct a management audit of Aquila to evaluate the quality of Aquila's management.--Aquila, Inc. 14 MPSC 3d 464.

IV. RELATIONS BETWEEN CONNECTING COMPANIES**§49. Records and statements**

The Commission considered and rejected specified tariff sheets and testimony due to Empire's failure to comply with the Commission's Order Clarifying Continued Applicability of the Interim Energy which was voluntarily negotiated in Case No. ER-2004-0570 between Empire, Praxair, Inc., Explorer Pipeline, Inc. and the Office of Public Counsel and subsequently memorialized in a Stipulation and Agreement.--The Empire District Electric Company 14 MPSC 3d 477.

EVIDENCE, PRACTICE AND PROCEDURE**I. IN GENERAL**

- §1. Generally**
- §2. Jurisdiction and powers**
- §3. Judicial notice; matters outside the record**
- §4. Presumption and burden of proof**
- §5. Admissibility**
- §6. Weight, effect and sufficiency**
- §7. Competency**
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II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally**
- §10. Admissions**
- §11. Best and secondary evidence**
- §12. Depositions**
- §13. Documentary evidence**
- §14. Evidence by Commission witnesses**
- §15. Opinions and conclusions; evidence by experts**
- §16. Petitions, questionnaires and resolutions**
- §17. Photographs**
- §18. Record and evidence in other proceedings**
- §19. Records and books of utilities**
- §20. Reports by utilities**
- §21. Views**

III. PRACTICE AND PROCEDURE

- §22. Parties**
- §23. Notice and hearing**
- §24. Procedures, evidence and proof**

- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence
- §33. Defaults

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§8. Stipulation

The Commission allowed the Office of the Public Counsel to withdraw from a stipulation after a stipulation hearing, but before the Commission decided to approve or reject it.--Aquila, Inc. 14 MPSC 3d 176.

II. PARTICULAR KINDS OF EVIDENCE

§18. Record and evidence in other proceedings

A docketed case will allow the Commission to take evidence and create a record that documents the natural gas utilities' efforts to keep the delivered price of natural gas stable.--Investigation - Gas Utility Compliance 14 MPSC 3d 50.

III. PRACTICE AND PROCEDURE

§28. Arbitration

Section 252(b) of the Telecommunications Act requires a petitioning party to provide "all relevant documentation" simultaneously with its petition. T-Mobile argued that the Commission should dismiss Alma's claim because Alma failed to provide cost studies with its petition. The Commission was unwilling to grant such a drastic remedy because Section 252(b) failed to provide a remedy for a violation of that section.--Alma Telephone Company 14 MPSC 3d 97.

EXPENSE

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility

- §3. Financing practices
- §4. Apportionment
- §5. Valuation
- §6. Accounting

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power
- §11. Gas
- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercorporate costs or dealings

V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees

EXPENSE

§35.	Construction
§36.	Consolidation expense
§37.	Depreciation
§38.	Deficits under rate schedules
§39.	Donations
§40.	Dues
§41.	Employee's pension and welfare
§42.	Expenses relating to property not owned
§43.	Expenses and losses of subsidiaries or other departments
§44.	Expenses of non-utility business
§45.	Expenses relating to unused property
§46.	Expenses of rate proceedings
§47.	Extensions
§48.	Financing costs and interest
§49.	Franchise and license expense
§50.	Insurance and surety premiums
§51.	Legal expense
§52.	Loss from unprofitable business
§53.	Losses in distribution
§54.	Maintenance and depreciation; repairs and replacements
§55.	Management, administration and financing fees
§56.	Materials and supplies
§57.	Purchases under contract
§58.	Office expense
§59.	Officers' expenses
§60.	Political and lobbying expenditures
§61.	Payments to affiliated interests
§62.	Rentals
§63.	Research
§64.	Salaries and wages
§65.	Savings in operation
§66.	Securities redemption or amortization
§67.	Taxes
§68.	Uncollectible accounts
§69.	Administrative expense
§70.	Engineering and superintendence expense
§71.	Interest expense
§72.	Preliminary and organization expense
§73.	Expenses incurred in acquisition of property
§74.	Demand charges
§75.	Expenses incidental to refunds for overcharges
§76.	Matching revenue/expense/rate base
§77.	Adjustments to test year levels
§78.	Isolated adjustments

EXPENSE**VI. PARTICULAR KIND OF EXPENSE****§35. Construction**

The Commission determined that Boulevard cannot perform any work on the KCPL facilities unless authorized and approved by KCPL, pursuant to its tariffs.--City of Kansas City v. KCPL 14 MPSC 3d 303.

GAS**I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Abandonment or discontinuance**
- §5. Liability for damages**
- §6. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally**
- §11. Leakage, shrinkage and waste**
- §12. Location**
- §13. Additions and betterments**
- §14. Extensions**
- §15. Maintenance**
- §16. Safety**

IV. OPERATION

- §17. Operation generally**
- §17.1. Purchased Gas Adjustment (PGA)**
- §17.2. Purchased Gas-incentive mechanism**
- §18. Rates**
- §19. Revenue**
- §20. Return**
- §21. Service**

- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Depreciation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business

§62.	Expenses relating to unused property
§63.	Expenses of rate proceedings
§64.	Extensions
§65.	Financing costs and interest
§66.	Franchise and license expense
§67.	Insurance and surety premiums
§68.	Legal expense
§69.	Loss from unprofitable business
§70.	Losses in distribution
§71.	Maintenance and depreciation; repairs and replacements
§72.	Management, administration and financing fees
§73.	Materials and supplies
§74.	Purchases under contract
§75.	Office expense
§76.	Officers' expenses
§77.	Political and lobbying expenditures
§78.	Payments to affiliated interests
§79.	Rentals
§80.	Research
§81.	Salaries and wages
§82.	Savings in operation
§83.	Securities redemption or amortization
§84.	Taxes
§85.	Uncollectible accounts
§86.	Administrative expense
§87.	Engineering and superintendence expense
§88.	Interest expense
§89.	Preliminary and organization expense
§90.	Expenses incurred in acquisition of property
§91.	Demand charges
§92.	Expenses incidental to refunds for overcharges

GAS

I. IN GENERAL

§2. Obligation of the utility

Natural Gas Utilities must structure their portfolios of contracts with various supply and pricing provisions in an effort to mitigate upward natural gas price spikes, and provide a level of stability of delivered natural gas prices.--Investigation - Gas Utility Compliance 14 MPSC 3d 50.

This Emergency Amendment provides additional repayment plans for residential users of natural gas for heating purposes. During the winter

gas prices are high and many people cannot afford to heat their homes. This rule sets up the obligations placed upon the utility company.-- Amendment to Cold Weather Rule 14 MPSC 3d 160.

The Commission approved the Stipulation and Agreement that helped resolve concerns about Southern Missouri Gas' hedging practices; the parties agreed to establish a former process for Southern Missouri Gas to annually provide the Commission, Staff, and Public Counsel with a formal plan for physical purchases and hedging for its natural gas supply.--OPC v. Southern Missouri Gas 14 MPSC 3d 316.

§3. Certificate of convenience and necessity

The Commission approved the sale of assets of Fidelity Natural Gas, Inc., to Laclede Gas Company with certain conditions agreed to by the parties and granted a certificate of convenience and necessity to Laclede Gas Company to operate in the service area of Fidelity Natural Gas, Inc.--Fidelity Natural Gas 14 MPSC 3d 229.

The Empire District Gas Company was granted a certificate of convenience and necessity to provide natural gas service as a gas corporation and public utility, subject to the jurisdiction of the Commission, in the service areas now served by Aquila, Inc. The Commission found that granting the certificate would not be detrimental to the public interest.--Aquila, Inc. 14 MPSC 3d 324.

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.--Aquila, Inc. 14 MPSC 3d 327.

The Commission granted Aquila a certificate of convenience and necessity for its already-built South Harper Facility and Peculiar Substation in Cass County, Missouri.--Aquila, Inc. 14 MPSC 3d 400.

§6. Transfer, lease and sale

The Commission approved the sale of assets of Fidelity Natural Gas, Inc., to Laclede Gas Company with certain conditions agreed to by the parties and granted a certificate of convenience and necessity to Laclede Gas Company to operate in the service area of Fidelity Natural Gas, Inc.--Fidelity Natural Gas 14 MPSC 3d 229.

Aquila was authorized to sell, transfer and assign to The Empire District Gas Company, and The Empire District Electric Company was authorized to acquire certain assets and liabilities of Aquila's Missouri jurisdictional gas utility operations as described in the Purchase Agreement. The Commission found that granting the transfer would not be detrimental to the public interest.--Aquila, Inc. 14 MPSC 3d 324.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Commission can open a case for the purpose of investigating the status of natural gas utilities' compliance with 4 CSR 240-40.018 and can take evidence on the record concerning that compliance.--Investigation - Gas Utility Compliance 14 MPSC 3d 50.

III. CONSTRUCTION AND EQUIPMENT

§10. Construction and equipment generally

The Commission granted the requests Staff made regarding Laclede Gas Company's direct-buried copper service line replacement program and the effectiveness of Laclede's leak survey procedures. The current requirements of the previously approved Stipulation and Agreement will be continued.--Laclede Gas Company 14 MPSC 3d 208.

§13. Additions and betterments

The Atmos Energy Corporation's application to modify its approved cast iron main and unprotected steel main replacement program is approved by the Commission. Atmos attempts to replace the current low pressure system with a high pressure system.--Atmos Energy Corporation 14 MPSC 3d 200.

The Commission approved Staff's recommendation which required City Utilities to implement staff's recommendation into its gas safety program and continue replacing plastic piping in its service lines.--City Utilities of Springfield 14 MPSC 3d 205.

§15. Maintenance

The Atmos Energy Corporation's application to modify its approved cast iron main and unprotected steel main replacement program is approved. This would require the company to replace all cast iron mains by 2020 and to replace or cathodically protect all unprotected steel mains by 2005.--Atmos Energy Corporation 14 MPSC 3d 200.

§16. Safety

The Atmos Energy Corporation shall conduct semiannual leak surveys of the Hannibal northeast side low pressure area until the entire additional steel main has been replaced. This is well within the federal requirement that service lines be surveyed for leaks at three-year intervals. Atmos is also required to conduct semiannual leak surveys of all

remaining portions of unprotected steel service lines and shall repair any class III or IV leaks within six months.--Atmos Energy Corporation 14 MPSC 3d 200.

The Commission approved Staff's recommendation which required City Utilities to implement Staff's recommendation into its gas safety program and continue replacing plastic piping in its service lines.--City Utilities of Springfield 14 MPSC 3d 205.

IV. OPERATION

§17.1. Purchased Gas Adjustment (PGA)

Every season before the winter heating season starts and before utilities raise their rates through the Purchased Gas Adjustment process, Public Counsel stated that they should be required to demonstrate their compliance with 4 CSR 240-40.018.--Investigation - Gas Utility Compliance 14 MPSC 3d 50.

§18. Rates

Laclede Gas Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for gas service provided to retail customers in its Missouri area. After rejecting the initial tariff, the Commission approved a rate increase agreed to by all of the parties.--Laclede Gas Company 14 MPSC 3d 59.

MGE is authorized to establish an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenue of \$2,388,348. MGE was attempting to raise their rates to recover costs for infrastructure system replacements and relocations.--Missouri Gas Energy 14 MPSC 3d 197.

§19. Revenue

Laclede would receive an estimated \$8.5 million in new revenues contemplated by the settlement. The Commission agreed with Laclede and held that rate increases are necessary from time to time to ensure that the utilities have the cash flow to maintain safe and adequate service.--Laclede Gas Company 14 MPSC 3d 59.

§29. Costs and expenses

The cost of compliance with this rule shall not include any lost revenues or other costs associated with the gas utility's agreement to temporarily waive or suspend reconnection fees or deposit requirements otherwise applicable to customers who were qualified for financial assis-

tance under the Low-Income Heating Energy or Assistance Program. No gas utility should be allowed to recover costs under this subsection that would have been incurred in the absence of this emergency rule.--Amendment to Cold Weather Rule 14 MPSC 3d 160.

The Commission approved Staff's recommendation which required City Utilities to implement Staff's recommendation into its gas safety program and continue replacing plastic piping in its service lines.--City Utilities of Springfield 14 MPSC 3d 205.

§33. Billing practices

The Commission determined that MGE violated sections 3.01 and 2.02 of its tariff when attempting to require Complainant to pay for his daughter's bill. The Commission required MGE to credit Complainant's account in the amount of \$241.71.--Kitchen v. Missouri Gas Energy 14 MPSC 3d 576.

§34. Accounting Authority orders

Based on the Sibley standard that the Commission has applied to requests for accounting authority orders for fifteen years, an accounting authority order is appropriate if the applicant demonstrates that the costs to be deferred are "extraordinary, unusual and unique, and not recurring."--Missouri Gas Energy 14 MPSC 3d 1.

An accounting authority order is not a guarantee that the company will be able to recover all of its deferred expenses in rates.--Missouri Gas Energy 14 MPSC 3d 1.

The Commission authorized an accounting authority order to permit a gas company to defer the cost of property taxes imposed by the state of Kansas while the company challenged the legality of the taxes in the Kansas courts.--Missouri Gas Energy 14 MPSC 3d 1.

Any accounting authority order creates a mismatch between the customers who benefit from the expenditure and the customers who will be required to pay those costs. For that reason a deferral should not be allowed to continue any longer than necessary.--Missouri Gas Energy 14 MPSC 3d 1.

VI. PARTICULAR KIND OF EXPENSES

§44. Additions and betterments

The Commission approved Staff's recommendation which required City Utilities to implement Staff's recommendation into its gas safety program and continue replacing plastic piping in its service lines.--City Utilities of Springfield 14 MPSC 3d 205.

§51. Collection fees

Late payment charges shall not be assessed except with respect to failure to make timely payments under the payment plan; and the gas utility shall not charge customers interest on the account balance for any deferral period.--Amendment to Cold Weather Rule 14 MPSC 3d 160.

§71. Maintenance and depreciation; repairs and replacements

The Commission approved Staff's recommendation which required City Utilities to implement Staff's recommendation into its gas safety program and continue replacing plastic piping in its service lines.--City Utilities of Springfield 14 MPSC 3d 205.

MANUFACTURED HOUSING**I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

II. WHEN A PERMIT IS REQUIRED

- §6. When a permit is required generally**
- §7. Operations and construction**

III. GRANT OR REFUSAL OF A PERMIT

- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
- §10. Who may possess**
- §11. Public safety**

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally**
 - §13. Duration of the permit**
 - §14. Modification and amendment of the permit generally**
 - §15. Transfer, mortgage or lease generally**
 - §16. Revocation, cancellation and forfeiture generally**
 - §17. Acts or omissions justifying revocation or forfeiture**
 - §18. Necessity of action by the Commission**
 - §19. Penalties**
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MANUFACTURED HOUSING**IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION****§19. Penalties**

The Commission approved the stipulated agreement in which the Director of Manufactured Housing and Four Seasons agreed that Four Seasons pay a \$3,000 penalty, payable to public school fund of the state, within 10 days of the Commission's approval of the agreement. Four Seasons also agreed to implement a detailed quality control procedure approved by the director.--Dir. of Manufactured Housing v. Four Seasons Housing 14 MPSC 3d 569.

PUBLIC UTILITIES**I. IN GENERAL**

- §1. Generally**
- §2. Nature of**
- §3. Functions and powers**
- §4. Termination of status**
- §5. Obligation of the utility**

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally**
- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general**
- §11. Franchises**
- §12. Charters**
- §13. Acquisition of public utility property**
- §14. Compensation or profit**
- §15. Eminent domain**
- §16. Property sold or leased to a public utility**
- §17. Restrictions on service, extent of use**
- §18. Size of business**
- §19. Solicitation of business**
- §20. Submission to regulation**
- §21. Sale of surplus**
- §22. Use of streets or public places**

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally**
- §24. Municipal plants**
- §25. Municipal districts**
- §26. Mutual companies; cooperatives**
- §27. Corporations**
- §28. Foreign corporations or companies**
- §29. Unincorporated companies**
- §30. State or federally owned or operated utility**
- §31. Trustees**

PUBLIC UTILITIES
I. IN GENERAL**§1. Generally**

The Commission estimated the expenses to be incurred by it during the fiscal year to amount to \$17,695,619. These expenses were considered to be directly attributable to the six groups of public utilities: electrical, gas, heating, water, sewer, and telephone, which totaled for all groups \$8,965,786.--Assessment FY 2007 14 MPSC 3d 480.

§5. Obligation of the utility

The Commission assessed a total of \$15,362,712 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2007.--Assessment FY 2007 14 MPSC 3d 480.

Because Hickory Hills is a public utility as defined by Section 386.020(42), RSMo 2000, and as a public utility, they were required to provide safe and adequate service to their customers. The Commission determined that they were not able to do so, and therefore there was a clear and immediate need for the appointment of a receiver to take charge of Hickory Hills.--Hickory Hills Water & Sewer 14 MPSC 3d 560.

The Commission ruled that the City Utilities of Springfield shall continue to follow the recommendations of the Staff of the Missouri Public Service Commission as previously directed and shall conduct a leak survey during calendar year 2007 over all pre-1983 plastic piping operating at high pressure that is currently not annually leak-surveyed.--City Utilities of Springfield 14 MPSC 3d 580.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

Hickory Hills was a public utility as defined by Section 386.020(42), RSMo 2000. They were also classified as both a sewer and a water corporation and were subject to the Commission's jurisdiction. The Commission determined that there was a clear and immediate need for the appointment of a receiver to take charge of Hickory Hills to ensure that its customers received safe and adequate sewer service.-- Hickory Hills Water & Sewer 14 MPSC 3d 560.

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations

- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records

- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service

- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

VIII. RATE DESIGN, CLASS COST OF SERVICE

- §118. Method of allocating costs
- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities
- §123. Rate design, class cost of service for telecommunications utilities
- §124. Rate design, class cost of service for heating utilities

RATES

I. JURISDICTION AND POWERS

§1. Jurisdiction and powers generally

This order approves a new rate schedule that allows Kansas City Power & Light Company to enter into contracts with their large customers subject to certain conditions contained in the tariff.--Kansas City Power & Light 14 MPSC 3d 281.

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

§66. Filing of schedules reports and records

This order approves a new rate schedule that allows Kansas City Power & Light Company to enter into contracts with their large customers subject to certain conditions contained in the tariff.--Kansas City Power & Light 14 MPSC 3d 281.

§77. Billing methods and practices

The Commission approved the Stipulation and Agreement between the Staff of the Commission, Office of Public Counsel, and New Florence Telephone Company which purports to resolve concerns about over-earning by New Florence. The terms of this order and the stipulation and agreement provide a financial penalty that cannot be recovered from the ratepayers of the company.--PSC Staff v. New Florence Telephone 14 MPSC 3d 551.

V. KINDS AND FORMS OF RATES AND CHARGES**§81. Surcharges**

MGE is authorized to establish an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenue of \$2,388,348. MGE was attempting to raise their rates to recover costs for infrastructure system replacements and relocations.--Missouri Gas Energy 14 MPSC 3d 197.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES**§110. Telecommunications**

Laclede Gas Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for gas service provided to retail customers in its Missouri area. After rejecting the initial tariff, the Commission approved a rate increase agreed to by all of the parties.--Laclede Gas Company 14 MPSC 3d 59.

Application and petition by Missouri Gas Energy for the establishment of an Infrastructure System Replacement Surcharge. MGE seeks to increase its rates in order to recover costs for infrastructure system replacements and relocations that are eligible for ISRS recognition.--Missouri Gas Energy 14 MPSC 3d 197.

SECURITY ISSUES**I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Authorization by a corporation**
- §4. Conversion, redemption and purchase by a corporation**
- §5. Decrease of capitalization**
- §6. Sinking funds**

- §7. Dividends
- §8. Revocation and suspension of Commission authorization
- §9. Fees and expenses
- §10. Purchase by utility
- §11. Accounting practices

II. JURISDICTION AND POWERS

- §12. Jurisdiction and powers in general
- §13. Jurisdiction and powers of Federal Commissions
- §14. Jurisdiction and powers of the State Commission
- §15. Jurisdiction and powers of local authorities

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

- §16. Necessity of authorization by the Commission generally
- §17. Installment contracts
- §18. Refunding or exchange of securities
- §19. Securities covering utility and nonutility property
- §20. Securities covering properties outside the State

IV. FACTORS AFFECTING AUTHORIZATION

- §21. Factors affecting authorization generally
- §21.1. Effect on bond rating
- §22. Equity capital
- §23. Charters
- §24. Competition
- §25. Compliance with the terms of a mortgage or lease
- §26. Definite plans and purposes
- §27. Financial conditions and prospects
- §28. Use of proceeds
- §29. Dividends and dividend restrictions
- §30. Improper practices and irregularities
- §31. Intercompany relations
- §32. Necessity of issuance
- §33. Revenue
- §34. Rates and rate base
- §35. Size of the company
- §36. Title of property
- §37. Amount
- §38. Kind of security
- §39. Restrictions imposed by the security

V. PURPOSES AND SUBJECTS OF CAPITALIZATION

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments

- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

VI. KINDS AND PROPORTIONS

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

VII. SALE PRICE AND INTEREST RATES

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

VIII. FINANCING METHODS AND PRACTICES

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

IX. PARTICULAR UTILITIES

- §76. Telecommunications
- §77. Electric and power
- §78. Gas
- §79. Sewer
- §80. Water
- §81. Miscellaneous

SECURITY ISSUES

No headnotes in this volume involved the question of security issues.

SERVICE**I. IN GENERAL**

- §1. Generally
- §2. What constitutes adequate service
- §3. Obligation of the utility
- §4. Abandonment, discontinuance and refusal of service
- §5. Contract, charter, franchise and ordinance provisions
- §6. Restoration or continuation of service
- §7. Substitution of service
- §7.1. Change of supplier
- §8. Discrimination

II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally
- §10. Jurisdiction and powers of the Federal Commissions
- §11. Jurisdiction and powers of the State Commission
- §12. Jurisdiction and powers over service outside of the state
- §13. Jurisdiction and powers of the courts
- §14. Jurisdiction and powers of local authorities
- §15. Limitations on jurisdiction
- §16. Enforcement of duty to serve

III. DUTY TO SERVE

- §17. Duty to serve in general
- §18. Duty to render adequate service
- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance

- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

SERVICE

III. DUTY TO SERVE

§ 18. Duty to render adequate service

Mill Creek Sewers received a number of written customer complaints which claimed damaged real property and sewage backup, a lack of

customer service and customers having to repair the sewage system. It is the obligation of the utility to provide safe and adequate sewer service to their customers.--Mill Creek Sewers, Inc. 14 MPSC 3d 55.

V. SERVICE BY PARTICULAR UTILITIES

§44. Sewer

The Commission held that without the proper funding or rate increase, Mill Creek Sewers would be unable to serve their customers properly.-Mill Creek Sewers, Inc. 14 MPSC 3d 55.

SEWER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

III. OPERATIONS

- §10. Operation generally
- §11. Construction and equipment
- §12. Maintenance
- §13. Additions and betterments
- §14. Rates and revenues
- §15. Return
- §16. Costs and expenses
- §17. Service
- §18. Depreciation
- §19. Discrimination
- §20. Apportionment
- §21. Accounting
- §22. Valuation
- §23. Extensions
- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues

- §28. Rules and regulations**
 - §29. Billing practices**
 - §30. Eminent domain**
 - §31. Accounting Authority orders**
-

SEWER

I. IN GENERAL

§1. Generally

The Commission ruled that Hurricane Deck Holding Company offered services to the public and therefore made itself subject to regulation as a public utility. The statutory definition of a water and sewer corporation does not include a requirement that the owner of the corporation actually receive payment for such services.--PSC Staff v. Hurricane Deck Holding Company 14 MPSC 3d 582.

§3. Obligation of the utility

It is the obligation of the utility to provide safe and adequate sewer service to their customers. The Commission approves a tariff that will enable Mill Creek Sewers, Inc. to do so.--Mill Creek Sewers, Inc. 14 MPSC 3d 55.

§4. Transfer, lease and sale

The General Counsel of the Commission was directed to seek a finding from the Circuit Court of Cole County that control of and responsibility for Hickory Hills Water and Sewer Co., Inc., should not, in the best interest of the company's customers, be returned to the owners of the company and that the receiver should be directed to transfer by sale or liquidate the assets of the company in the manner provided by law.--Hickory Hills Water & Sewer 14 MPSC 3d 560.

The fourth count of the Staff's complaint alleged that Hurricane Deck Holding Company violated §393.190.1 by transferring the water and sewer systems serving the Chelsea Rose Service Area from Hurricane Deck Holding Company to Chelsea Rose Land Owners Association without having obtained authorization from the Commission. The Commission ruled that the Staff of the Commission would not be granted summary judgment on this count.--PSC Staff v. Hurricane Deck Holding Company 14 MPSC 3d 582.

III. OPERATIONS**§14. Rates and revenues**

Mill Creek Sewers proposes a rate increase from \$5 a month to \$30.11 a month and the Commission approves it. This is the amount that they have figured is necessary in order to properly run the system. The increase does not include a return on the rate base, but reflects only the necessary costs.--Mill Creek Sewers, Inc. 14 MPSC 3d 55.

§17. Service

The Commission held that a failure to increase the tariff would lead to a violation of §393.130.1 which requires that every sewer company provides safe and adequate service.--Mill Creek Sewers, Inc. 14 MPSC 3d 55.

STEAM
I. INGENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Transfer, lease and sale**
- §4.1. Change of suppliers**
- §5. Charters and franchise**
- §6. Territorial agreements**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally**
- §8. Jurisdiction and powers of Federal Commissions**
- §9. Jurisdiction and powers of the State Commission**
- §10. Jurisdiction and powers of the local authorities**
- §11. Territorial agreements**
- §12. Unregulated service agreements**

III. OPERATIONS

- §13. Operations generally**
- §14. Rules and regulations**
- §15. Cooperatives**
- §16. Public corporations**
- §17. Abandonment and discontinuance**
- §18. Depreciation**
- §19. Discrimination**
- §20. Rates**

- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

STEAM

III. OPERATIONS

§20. Rates

Aquila, Inc. submitted proposed tariff sheets intended to implement a rate increase for steam service provided to retail customers in its L&P operating division in Missouri. The stipulation and agreement was approved but Aquila, Inc's proposed steam heat tariff sheets were rejected.--Aquila, Inc. 14 MPSC 3d 240.

TELECOMMUNICATIONS**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §14.1. Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements

- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally, or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

TELECOMMUNICATIONS

I. IN GENERAL

§1. Generally

Southwestern Bell Telephone doing business as SBC Missouri, filed certain proposed tariff sheets intended to change its fictitious name to AT&T Missouri. The Commission reviewed these documents and found that the change of name should be recognized.--SBC Missouri 14 MPSC 3d 158.

MCI Communications Services filed tariff sheets changing the name of MCI Communications Services to MCI Communications Services d/b/a Verizon Business Services. The Commission approved the name change and accompanying tariff sheets.--MCI Communications Services 14 MPSC 3d 189.

The Commission recognized the name change from SBC Long Distance, LLC, d/b/a SBC Long Distance to SBC Long Distance, LLC, d/b/a AT&T Long Distance.--SBC Long Distance 14 MPSC 3d 195.

The Commission approved a request, changing the name of SBC Advanced Solutions, Inc., to SBC Advanced Solutions, Inc. d/b/a AT&T Advanced Solutions.--SBC Advanced Solutions, Inc. 14 MPSC 3d 227.

The Commission recognized Sprint Long Distance, Inc.'s name change to Embarq Communications, Inc. The Commission also approved the company's motion for expedited treatment of its tariff pages in that there were no textual changes, other than the company name, and there is no negative effect on its customers.--Sprint Long-Distance, Inc. 14 MPSC 3d 299.

The Commission approved a request, changing the name of Sprint, Missouri, Inc. to Embarq Missouri, Inc., d/b/a Embarq.--Sprint Missouri, Inc. 14 MPSC 3d 448.

The Commission granted Staff the authority to seek penalties in circuit court against CassTel for violations of law by its former President, Kenneth M. Matzdorff. The Commission also said that none of the penalty shall be recovered from CassTel's ratepayers as a result of this order.-PSC Staff v. Cass County Telephone 14 MPSC 3d 456.

T-Mobile filed a complaint against the respondent rural Local Exchange Carriers (LEC) because the LEC's had notified T-Mobile that they had requested AT&T Missouri and Sprint, Missouri, Inc block all T-Mobile traffic destined to specified exchanges of the rural LEC's. The Commission issued its Order Denying Application for Rehearing and Reconsideration, but Offering Clarification in response to T-Mobile's application for rehearing and reconsideration of the Commission's Notice Regarding Obligation to Cease Blocking Preparations Pending Commission Decision. T-Mobile's application indicated that the Commission's notice characterizes T-Mobile as an "originating carrier" within the meaning of the Commission's Enhanced Record Exchange rules.--T-Mobile USA, Inc. v. BPS Telephone Co., et al. 14 MPSC 3d 539.

§2. Obligation of the utility

Telecommunications companies are required to have schedules on file with the Commission showing their rates, rentals and charges for service of each and every kind by or over its facilities. It is also mandated that telecommunications companies list the charges for their services, which Time Warner failed to list. The charges must also be listed in US dollars which Time Warner also has failed to list.--Time Warner Cable 14 MPSC 3d 565.

§3.1. Certificate of local exchange service authority

FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, is granted a certificate of service authority to provide local telecommunications service.--Cass County Telephone 14 MPSC 3d 450.

§4. Transfer, lease and sale

Commission approved Sprint's application that outlined a plan to transfer control of a Sprint Missouri, Inc., Sprint Long Distance, Inc., and Sprint Payphone Services, Inc., from Sprint Nextel to a new independent holding company, Embarq.--Sprint Nextel Corporation 14 MPSC 3d 279.

The Commission approved Alltel Missouri, Inc., Alltel Communications, Inc., Alltel Holding Corp., Alltel Holding Corporate Services, Inc., and Valor Communications Group, Inc.'s joint application that transferred control of Alltel Missouri, Inc., to Alltel Holding Corp. It also approved the transfer of Alltel Communications, Inc.'s interexchange service customer base to Alltel Holding Corporate Services, Inc. This is basically separating Alltel's wireline business from its wireless business and merging the wireline business with Valor Communications Group, Inc.--Alltel Missouri, Inc. 14 MPSC 3d 338.

The Joint Application for approval of the transfer and acquisition of the Missouri facilities and systems of Cass County Telephone Company, L.P., and LEC Long Distance, Inc., d/b/a CassTel Long Distance, by Fair Point Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, in accordance with the Submitted Asset Purchase Agreement, is granted.--Cass County Telephone 14 MPSC 3d 450.

II. JURISDICTION AND POWERS**§7. Jurisdiction and powers of the State Commission**

Section 251(b) of the Telecommunications Act of 1996 gives the Commission the authority to arbitrate unresolved issues during the negotiation of an interconnection agreement. Commission Rule 4 CSR 240-36.040 governs how a case will proceed once a party has asked for arbitration.--Alma Telephone Company 14 MPSC 3d 97.

Competitive telecommunications companies are not subject to rate of return regulation and the Commission has no authority to regulate the competitive rates that they will charge their customers based on the companies' costs or the amount of profits they will make.--AT&T 14 MPSC 3d 163.

The Commission had the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.--CenturyTel of Missouri, LLC 14 MPSC 3d 346.

Time Warner is subject to the Commission's jurisdiction pursuant to Chapters 386 and 392, RSMo, in that it provides telecommunications services in the state of Missouri and is not excepted from the definition

of a telecommunications company, nor is it exempt from such jurisdiction.--Time Warner Cable 14 MPSC 3d 565.

III. OPERATIONS

§8. Operations generally

The Commission determined that 4 CSR 240-29.040(4) does not require the inclusion of calling party number for wireless calls in the Category 11 billing records exchanged by telecommunications companies for traffic that traverses the LEC-to-LEC network.--Southwestern Bell Telephone, L.P. MPSC 3d 393.

§14. Rates

The Commission denied Public Counsel's motions to suspend tariffs designed to implement Instate Access Recovery Fees by competitive long distance carriers.--AT&T 14 MPSC 3d 163.

Section 392.200.1, RSMo, which requires that rates be just and reasonable, no longer applies to rate changes made by competitive companies. Instead the legislature has determined that competition will ensure that the rates charged by competitive companies will be just and reasonable.--AT&T 14 MPSC 3d 163.

The monthly instate recovery fees included in the challenged tariffs do not improperly discriminate against any Missouri customer. --AT&T 14 MPSC 3d 163.

§16. Revenue

Staff determined that CassTel was earning excess revenues. To rectify that situation, the parties agreed CassTel would pay \$3.6 million to its qualifying customers, partly as a credit on bills and partly as a cash payment.--Investigation - Cass County Telephone 14 MPSC 3d 461.

§19. Financing practices

Green Hills filed a motion to modify the order approving their application to borrow funds and pledge its assets as security for the loan. Green Hills determined that it no longer needed to borrow \$22,704,000 and decreased the amount to \$9,500,000. The Commission agreed.--Green Hills Telephone Corporation 14 MPSC 3d 113.

The Commission granted Green Hills Telephone Corporation's Motion to modify the Commission's previous order approving its financing to make clear that Green Hills could execute the debt instruments from the Rural Utilities Service and the Rural Telephone Bank as they were drafted.--Green Hills Telephone Corporation 14 MPSC 3d 151.

The Commission authorized an incumbent local exchange carrier to execute a secured guaranty relating to a previously approved financing transaction.--Oregon Farmers Mutual 14 MPSC 3d 153.

§27. Invasion of adjacent service area

The parties involved agreed that the Wright City, Marthasville, Foley, Warrenton, and Holstein exchanges will become a new Tier 6 of the St. Louis Metropolitan Calling Area Plan. The Commission had legal authority to accept that agreement between the parties and does not make either findings of fact or conclusions of law in this order.--CenturyTel of Missouri, LLC 14 MPSC 3d 346.

§30. Calling scope

The Greenwood exchange will become a mandatory Metropolitan Calling Area Plan exchange in the Kansas City MCA. AT&T Missouri can also revise its prices through the tariff process at any time.--AT&T Missouri 14 MPSC 3d 191.

§33. Billing practices

The Commission approved the Stipulation and Agreement between the Staff of the Commission, Office of Public Counsel, and New Florence Telephone Company which purports to resolve concerns about over-earning by New Florence. The terms of this order and the stipulation and agreement provide a financial penalty that cannot be recovered from the ratepayers of the company.--PSC Staff v. New Florence Telephone 14 MPSC 3d 551.

§34. Pricing policies

The Commission instructed the task force to investigate issues related to the pricing of MCA service and the effects of an expanded MCA on pricing.--Investigation MCA 14 MPSC 3d 156.

IV. RELATIONS BETWEEN CONNECTING COMPANIES

§37. Physical connection

According to FCC rules, interconnection is the linking of two networks for the mutual exchange of traffic. Interconnection is direct when the carrier's facilities or equipment is attached to another carrier's facilities or equipment, and indirect when the attachment occurs through the facilities of equipment of an additional carrier. --Alma Telephone Company 14 MPSC 3d 97.

V. ALTERNATIVE REGULATION AND COMPETITION**§40. Classification of company or service as noncompetitive, transitionally, or competitive**

The Commission grants Sprint Missouri's request for competitive classification pursuant to Section 392.245.5 RSMo(2005), for residential services, other than exchange access service, for the Ferrelview, Platte City, and Weston exchanges. The Commission also grants competitive classification for business services, other than exchange access service, in the Ferrelview, Platte City, St. Robert, and Waynesville exchanges.--Sprint Missouri, Inc. 14 MPSC 3d 11.

The Commission grants SBC Missouri competitive classification for business services for 45 of the 61 exchanges requested. The Commission also grants SBC Missouri competitive classification for residential services for 26 of the 29 exchanges requested. The Commission transfers, to Case. No. TO-2006-0102, the consideration of SBC Missouri's request for competitive classification for business services in 16 exchanges and the residential services in three exchanges.--SBC Missouri 14 MPSC 3d 24.

The controlling statute - 392.245, RSMo - requires that an incumbent local exchange company's services be classified as competitive in any exchange in which two other non-affiliated carriers are providing basic local telecommunications services within that exchange. Separate determinations are made for business and residential services.--CenturyTel of Missouri 14 MPSC 3d 66.

The controlling statute – 392.245, RSMo - provides that an exchange is competitive in which two or more facilities-based wireline carriers are providing services to customers, of in which one facilities-based wireline carrier and one wireless carrier are providing services.--CenturyTel of Missouri 14 MPSC 3d 66.

When the explicit requirements of the controlling statute – 392.245, RSMo – are met, there is competition and the exchange must be classified as competitive. There is no room for further interpretation regarding whether that competition is effective.--CenturyTel of Missouri 14 MPSC 3d 66.

Spectra Communications Group, L.L.C. filed its request for competitive classification pursuant to 392.245.5, RSMo Supp. 2005. They seek competitive classification for its residential basic local telecommunications services in five exchanges and seek competitive classification for its business basic local telecommunications services in four exchanges.--Spectra 14 MPSC 3d 79.

SBC Missouri filed a petition for competitive classification pursuant to Section 392.245.5. The Commission determines that SBC Missouri shall be granted competitive classification for business services for 31 exchanges and for residential services for 51 exchanges.-- SBC Missouri 14 MPSC 3d 127.

The intrastate long distance market in Missouri is highly competitive.-- AT&T 14 MPSC 3d 163.

Spectra Communications Group, LLC, d/b/a CenturyTel, filed its application for competitive classification pursuant to Section 392.245.5, RSMo. Spectra requested that the Commission classify as competitive its residential services, other than exchange service, in the Everton and Mt. Vernon exchanges. The Commission concluded that CenturyTel's application for competitive classification of its residential services, other than exchange access services, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges should be granted.--Spectra Communications Group 14 MPSC 3d 243.

The Commission approved CenturyTel of Missouri, LLC's application requesting the Commission classify as competitive its residential services other than exchange access service, in the Ava, Columbia, Crane, Marshfield, and Seymour exchanges.--CenturyTel of Missouri, LLC 14 MPSC 3d 251.

The Commission granted Sprint Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo. Cum. Supp. 2005, for residential and business services, other than exchange access service, for the Jefferson City exchange.--Sprint Missouri, Inc. 14 MPSC 3d 333.

Embarq filed an application for competitive classification asking that the Commission classify as competitive its residential services, other than exchange access service, in the Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges. The Commission accepted the request and changed their classification.--Embarq Missouri, Inc. 14 MPSC 3d 541.

§46. Interconnection agreements

The Commission held that CenturyTel shall honor the interconnection agreement that it has with FullTel Inc. by taking whatever steps are necessary to actually interconnect and exchange traffic with FullTel because CenturyTel's only reason for denying interconnection no longer exists.--FullTel v. CenturyTel of Missouri 14 MPSC 3d 474.

§46.1. Interconnection Agreements-Arbitrated

The Commission relied upon traffic studies to determine the proper split of interMTA/intra MTA traffic, as well as the proper percentage of interMTA traffic that is interstate. The traffic studies, while imperfect, were similar to traffic studies the Commission had relied upon in previous cases.--Alma Telephone Company 14 MPSC 3d 97.

The Commission must apply federal law to decide arbitrations, even if that federal law conflicts with state law. According to FCC rule, reciprocal compensation applies for traffic exchanged between a local exchange carrier and a commercial mobile radio service provider that, at the beginning of the call, originates and terminates within the same Major Trading Area. Thus, it is the Major Trading Area's geographic boundary, and nothing else, that determines whether a local exchange carrier must pay reciprocal compensation. Furthermore, nothing in the FCC rules limits a local exchange carrier's obligation to pay reciprocal compensation to only when a wireless carrier connects directly to the local exchange carrier's network.--Alma Telephone Company 14 MPSC 3d 97.

The Commission resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. It also combined with TO-2006-0151 which resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. These issues include the method of interconnection, appropriate forward-looking cost methodology, and intercarrier compensation.--T-Mobile USA, Inc. 14 MPSC 3d 214.

The Commission resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. It also combined with TO-2006-0151 which resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. These issues include the method of interconnection, appropriate forward-looking cost methodology, and intercarrier compensation.--T-Mobile USA, Inc. 14 MPSC 3d 264.

The Commission resolved issues pertaining to the negotiation of interconnection agreements between Petitioners and T-Mobile USA, Inc. It also combined with TO-2006-0151 which attempted to resolve issues pertaining to the negotiation of interconnection agreements between Petitioners and Cingular Wireless. These issues include the method of interconnection, appropriate forward-looking cost methodology, and intercarrier compensation.--T-Mobile USA, Inc. 14 MPSC 3d 285.

Socket Telecom filed a petition for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 56, codified at various sections of Title 47, USC ("the

Act"), and Commission rule 4 CSR 240-36.040. Socket asks the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group LLC d/b/a CenturyTel of Missouri.--Socket Telecom, LLC 14 MPSC 3d 349.

Socket Telecom, LLC filed a petition for arbitration with the Commission asking the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group, LLC. The Commission determined that these companies should form an interconnection agreement consistent with the Report and Order.--Socket Telecom, LLC 14 MPSC 3d 482.

Socket Telecom, LLC filed a petition for arbitration with the Commission asking the Commission to resolve issues pertaining to the negotiation of interconnection agreements between it and CenturyTel of Missouri, LLC and Spectra Communications Group, LLC. The Commission determined that these companies should form an interconnection agreement consistent with the Report and Order.--Socket Telecom, LLC 14 MPSC 3d 548.

VALUATION

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VALUATION

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WATER**I. IN GENERAL****§1. Generally**

The Commission ruled that Hurricane Deck Holding Company offered services to the public and therefore has made itself subject to regulation as a public utility. The statutory definition of a water and sewer corporation does not include a requirement that the owner of the corporation actually receive payment for such services.--PSC Staff v. Hurricane Deck Holding Company 14 MPSC 3d 582.

§4. Transfer, lease and sale

The fourth count of the Staff's complaint alleged that Hurricane Deck Holding Company violated §393.190.1 by transferring the water and sewer systems serving the Chelsea Rose Service Area from Hurricane Deck Holding Company to Chelsea Rose Land Owners Association without having obtained authorization from the Commission. The Commission ruled that the Staff of the Commission would not be granted summary judgment on this count.--PSC Staff v. Hurricane Deck Holding Company 14 MPSC 3d 582.

The General Counsel of the Commission was directed to seek a finding from the Circuit Court of Cole County that control of and responsibility for Hickory Hills Water and Sewer Co., Inc., should not, in the best interest of the company's customers, be returned to the owners of the company and that the receiver should be directed to transfer by sale or liquidate the assets of the company in the manner provided by law.--Hickory Hills Water & Sewer 14 MPSC 3d 560.

II. JURISDICTION AND POWERS**§10. Receivership**

Section 393.145.1 RSMo Supp. 2005 provides that if the Commission "determines that any sewer or water corporation that regularly provides service to eight thousand or fewer customer connections is unable or unwilling to provide safe and adequate service, has been actually or effectively abandoned by its owners...the Commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of the receiver.

The Commission directed its Staff to seek appointment of a receiver after it found that a water and sewer company had been effectively abandoned by its owners, where a lack of available capital and poor management practices made it unlikely that the company could continue to provide service to its customers.

The Commission directed its Staff to seek appointment of a receiver after it found that a water and sewer company was unable or unwilling to provide safe and adequate service because of its desperate financial situation.--PSC Staff v. Missouri Utilities 14 MPSC 3d 319.

III. OPERATIONS

§28. Financing practices

The Commission granted Missouri-American Water Company its application which asked for authority to issue general mortgage bonds in an aggregate principal amount of up to \$57,490,000 for the purpose of discharging or refunding existing indebtedness.--Missouri-American Water Company 14 MPSC 3d 300.
